Supreme Court, U.S.
FILED

No. 98 596 OCT 7 1998

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In The

Supreme Court of the United States

October Term, 1998

JOHN H. BABIGIAN,

Petitioner,

vs.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT, STATE OF NEW YORK,

Respondent.

Petition for Writ of Certiorari to the New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

1. Did the rulings of the New York Court of Appeals and the District of Columbia Circuit Court of Appeals abolishing qualified immunity for government officials, on the grounds that such officials always enjoy absolute immunity, create an embarrassing conflict on a crucial legal question between the decisions of state and Federal Courts, the Federal Courts of different circuits, the decisions in their own circuits, and with the decisions of the United States Supreme Court?

2. The same courts rulings that judges always enjoy absolute immunity because of their status as judges?

3. Under the Due Process clause of the 14th Amendment, can an attorney be suspended without improper notice and the opportunity to be heard, and there is no record of any evidence to sustain the charges?

LIST OF PARTIES

All parties to the action before the New York courts are listed in the caption of this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Basis for Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ	3
I. The Decision Of The Federal Court Below Rested On Erroneous Conclusions Regarding The Immunity Of Government Officials And Judges Which Conflict With The Holdings Of This Court And Lower Federal And State Courts.	3
A. Government Officials	3
B. Judges	4
II. The District Court's Position On Jurisdiction, Venue And Res Judicata Are Clearly Erroneous And Belied By Its Own Citations And Factual Assertions.	5
A. Judge Sporkin's Bias	5
B. Chief Justice William H. Rehnquist and Discipline.	6

Contents

Page

III. The Disciplinary Proceeding Violated Due Process And Was Conducted In Bad Faith. ... 8

A. A Referee should Have Been Appointed to Hear the Factual Issues and to Determine the Applicable law. 8

B. The Decision of the Appellate Division is Clearly Erroneous, and the Judges of the Court of Appeals Denied Petitioner's Motion For Leave to Appeal in Bad Faith. 8

Conclusion 10

TABLE OF CITED AUTHORITIES

Cases:

ACLU Foundation of So. Cal. v. Barr, 952 F.2d 457 (D.C. Cir. 1991) 8

Babigian v. The Association of the Bar, 744 F. Supp. 47 (S.D. 1988) 9

Baez v. City of Amsterdam, __ A.D.2d __, 666 N.Y.S.2d 312 (1998) 4

Board of Education v. Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680, *affirmed* 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, *cert. denied,* 465 U.S. 1101 (1982) 4

Table of Cited Authorities

	Page
Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977) *cert. denied,* 437 U.S. 904 (1978)	4
Buckley v. Fitzsimmons, 509 U.S. 259 (1993)	3, 4
Burns v. Reed, 500 U.S. 478 (1991)	4
Chandler v. Judicial Council, 398 U.S. 74 (1970)	5
Forrester v. White, 484 U.S. 219 (1988)	4
Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180	3
Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983)	4
Hastings v. Judicial Conference of United States, 770 F.2d 1093 (D.C. Cir. 1985)	5
In re Moffett, 154 App. Div. 929, 139 N.Y.S. 545 (1st Dept. 1913)	8
Johnson v. Board of Education of the City of Chicago, 457 U.S. 52 (1981)	3
Kelley v. Everglades Drainage District, 319 U.S. 415 (1943)	8
Matter of Capoccia, 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983)	2
Matter of Nuey, 61 N.Y.2d 512, 463 N.E.2d 30 (1984)	8

Table of Cited Authorities

	Page
Mitchell v. Forsyth, 472 U.S. 511 (1985)	4
Moore v. Dormin, 173 Misc. 2d 836, 662 N.Y.S.2d 239 (Sup. Ct. N.Y.Co. 1997)	4
Schneiderman v. United States, 320 U.S. 118 (1943) .	8
Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1979)	5
Statutes:	
28 U.S.C. § 372(c)	5
28 U.S.C. § 1254(1)	1
United States Constitution:	
Fourteenth Amendment Due Process Clause	i
Rules:	
Rule § 806-4(c)(1)(ii) N.Y. App. Div. 3rd Dept.	2
Rule § 806.4(c)(2) N.Y. App. Div. 3rd Dept.	2
U.S. Sup. Ct. Rule 10	10
Fed. R. Civ. P. § 12(b)(6)	8

Table of Cited Authorities

	Page
Barr and Willging, DECENTRALIZED SELF-REGULATION, ACCOUNTABILITY, AND JUDICIAL INDEPENDENCE UNDER THE FEDERAL JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 142 Univ. Pa. L. Rev. 25 (1995)	7
Justice William H. Rehnquist, "Sense and Nonsense About Judicial Ethics," 28 The Record 694 (1973).	6
Judges Moving Away from West, LEGAL TIMES, May 22, 1995	7
Defense Bar, Federal Judiciary Clash Over Salty-Tongued Training Seminars, LEGAL TIMES, June 26, 1994	7

APPENDIX

Page

Appendix A — Decision Of The New York Supreme Court, Appellate Division, Third Department, Dated February 11, 1998 ..... 1a

Appendix B — Petition Of Charges And Specifications In The New York Supreme Court, Appellate Division, Third Department, Dated August 25, 1997 ..... 5a

Appendix C — Memorandum Opinion Of District Court Judge Stanley Sporkin, Filed September 7, 1995 .. 11a

Appendix D — Decision Of The New York Court Of Appeals Denying Motion For Reargument Of Motion For Leave To Appeal, Dated July 9, 1998 ..... 32a

Appendix E — Notice Of Motion For Leave To Appeal In The Court Of Appeals, State Of New York, Dated March 30, 1998 ..... 34a

Appendix F — Letter To Mr. Babigian From The State Of New York Committee On Professional Standards, June 23, 1997 ..... 40a

Appendix G — Notice Of Disciplinary Action From The State Of New York Committee On Professional Standards, Dated June 23, 1997 ..... 42a

Appendix H — Letter From Mr. Babigian Ms. Joyce M. Galante, Dated June 18, 1997 ..... 47a

Page

Appendix I — Letter To Mr. Babigian From The State Of New York Committee On Professional Standards, Dated June 5, 1997 ..... 52a

Appendix J — From Mr. Babigian To Mark S. Ochs, Dated May 5, 1997 ..... 54a

Appendix K — Letter From Mr. Babigian To Mark S. Ochs, Dated March 8, 1997 ..... 56a

Appendix L — Chief Attorneys Inquiry Of The State Of New York Supreme Court, Third Judicial Department, Dated February 4, 1997 ..... 58a

Appendix M — Advertisement In The Legal Times Week Of June 17, 1996 ..... 63a

BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The New York State Court of Appeals opinion was dated and entered on July 9, 1998.

STATEMENT OF THE CASE

Petitioner was placed under investigation on February 4, 1997 by service of a Chief Attorney's inquiry (A-58-62).

On March 8, 1997 Petitioner responded with a letter and documents (A-56-57).

After waiting fifty-seven days for a reply, petitioner responded with a letter on May 5, 1997 (A-54-55). At the time, Hal Lieberman was the Chief Counsel of the Departmental Disciplinary Committee in New York City, and a close friend of respondent Mark Ochs.

Thirty days later, Ochs responded by a letter dated June 5, 1997 (A-52-53). The statement that he granted petitioner extensions of time to submit a response is false, and his assertion that he had not received petitioner's written response is also false.

On June 18, 1997 petitioner submitted the matter to the respondent's Chairperson, Joyce M. Galante (A-47-51).

On June 23, 1997 Ochs replied to petitioner's letter to Galante (A-40-41). Petitioner's specific responses are set forth in the advertisement in the Washington Legal Times (A-63-85).

Without a hearing, respondents then issued a letter of admonition stating it was "based upon the inquiry, your

responses thereto and investigation by the Committee staff . . ." (A-42-46).

Pursuant to Rule § 806-4(c)(1)(ii), the Appellate Division, Third Department requires the respondent to establish ". . . the acts of misconduct ... by clear and convincing evidence," and to determine that the "misconduct is not serious enough to warrant prosecution of a disciplinary proceeding" as prerequisites for issuing a letter of admonition.

Pursuant to Rule § 806.4(c)(2) petitioner challenged respondent's action and demanded that the committee institute a disciplinary proceeding before the court. On August 25, 1997 respondent filed a Petition of Charges and Specifications against petitioner (A-71-76). The verification is not based on personal knowledge; a clear indication that respondent's have no evidence, much less the mandated clear and convincing evidence, to support their charges.

Petitioner then demanded the appointment of a referee and a public hearing. *Matter of Capoccia,* 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983).

Respondent then filed a Motion for Summary Judgment on the grounds that no factual issues were raised by Judge Sporkin's opinions that required the appointment of a referee. In essence, respondents adopted all of Judge Sporkin's factual and legal conclusions. Again, no personal affidavits were submitted, simply a memorandum of law on decisions involving collateral estoppel on factual issues decided by trial courts.

The court granted the motion and denied my cross-motion, and rendered its decision on February 11, 1998 (A-1-4).

The Memorandum Opinion of Judge Sporkin (A-11-31) and the above decision should be considered jointly in this petition.

Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180, 1181-1192, n.16; *Johnson v. Board of Education of the City of Chicago*, 457 U.S. 52 (1981).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FEDERAL COURT BELOW RESTED ON ERRONEOUS CONCLUSIONS REGARDING THE IMMUNITY OF GOVERNMENT OFFICIALS AND JUDGES WHICH CONFLICT WITH THE HOLDINGS OF THIS COURT AND LOWER FEDERAL AND STATE COURTS.

Judge Sporkin concluded:

> In this case, the Chief Justice of the United States and the Chief Judges comprising the Judicial Conference of the United States are entitled to *absolute immunity* from the Plaintiff's lawsuit *by virtue of their status as Judges.* The Defendant Department of Justice attorneys who elected not to initiate an investigation into the Plaintiff's allegations are also protected by *absolute immunity* because they were carrying out their *duties as government officials.*

(Memorandum Opinion at A-25 (emphasis added).)

A. Government Officials

Judge Sporkin's decision abolishes the well-established principle of qualified immunity for all government officials, both federal and state; *Buckley v. Fitzsimmons*, 509 U.S. 259

(1993); *Burns v. Reed,* 500 U.S. 478 (1991); *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir. 1977) *cert. denied,* 437 U.S. 904 (1978); *Gray v. Bell,* 712 F.2d 490 (D.C. Cir. 1983).

The New York State decisions recognizing the federal cases on qualified immunity are:

(1) *Board of Education v. Ambach,* 90 A.D.2d 227, 458 N.Y.S.2d 680, *affirmed* 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, *cert. denied,* 465 U.S. 1101 (1982).

(2) *Moore v. Dormin,* 173 Misc. 2d 836, 662 N.Y.S.2d 239 (Sup. Ct. N.Y.Co. 1997).

(3) *Baez v. City of Amsterdam,* __ A.D.2d __, 666 N.Y.S.2d 312.

Judge Sporkin has clearly recognized qualified immunity for government officials (A-73); neither he nor respondent cite any authority in support of his statement in the Memorandum Opinion.

The federal and state decisions recognizing qualified immunity are legion; they are listed under Civil Rights Key No. 214(9) and District and Prosecuting Attorneys Key No. 10.

B. Judges

Judges do not enjoy absolute immunity for their administrative duties. *Forrester v. White,* 484 U.S. 219 (1988).

As the Court stated in *Forrester,* 484 U.S. at 230:

> Absolute immunity . . . is "strong medicine, justified only when the danger of [officials' being] deflect[ed] from the effective performance of their duties] is very great."

The court's duties in regulating lawyers and judges are generally administrative in nature. *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1979).

The supervision of judges pursuant to 28 U.S.C. § 372(c) is an administrative function, and not a judicial function, *see Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970) (Judicial Councils are administrative bodies); *Hastings v. Judicial Conference of United States*, 770 F.2d 1093 (D.C. Cir. 1985). *See* discussion in Legal Times (A-72-73).

II.

THE DISTRICT COURT'S POSITION ON JURISDICTION, VENUE AND RES JUDICATA ARE CLEARLY ERRONEOUS AND BELIED BY ITS OWN CITATIONS AND FACTUAL ASSERTIONS.

A. The court's legal position on the above is simply ludicrous. (A-74-76). Respondent's claim that the above citations are not specific responses to those legal questions, and their claim that they possess clear and convincing evidence, based on their own staff investigation, is not worthy of belief.

The court asserts in bold caption that Chief Justice Wiliam H. Rehnquist, the Judicial Conference, the judges comprising the Judicial Conference, and the Department of Justice Officials are all protected by res judicata and collateral estoppel. (A-26-29). Petitioner never sued the above people prior to this action;

the individuals who were previously sued are all New York and Florida defendants. Petitioner informed respondent of the above factual absurdity, but they still maintain they have clear and convincing evidence to support that assertion.

B. Chief Justice William H. Rehnquist and Discipline.

Contrary to Judge Sporkin's opinion that requesting Justice Rehnquist to take disciplinary action against the New York Federal judges would interfere with his judicial duties, Justice Rehnquist takes an active role in this regard. (A-30).

In an article entitled "Sense and Nonsense About Judicial Ethics," 28 The Record 694 (1973), based on a speech given by the then Associate Justice Rehnquist at The Association of the Bar of the City of New York, in discussing a trial judge he stated:

> Nothing about his actions in connection with the case suggests that he would decide it in any other manner than to be fair on the facts and to follow the law to the best of his ability; indeed, he has sworn on oath that he will do so in all cases that come before him. (p. 699)

At pages 711-712, Justice Rehnquist states:

> . . . I stand foursquare, along with every other thinking person, against any sort of judicial corruption or any conduct on the part of judges which could lead reasonable people to conclude that they are behaving corruptly. I concur just as quickly with the notion that no judge should sit in judgment in a case . . . in which he might reasonably be thought to be partial to one of the parties.

In preparation for a report to the *National Commission on Judicial Discipline and Removal,* Jeffrey Barr, a Staff Attorney for the United States Court of Appeals for the First Circuit, and Thomas Willging, a Reasearcher at the Federal Judicial Center, were given access to confidential disciplinary files regarding judicial complaints on condition that no names would be used.

Their report is entitled DECENTRALIZED SELF-REGULATION, ACCOUNTABILITY, AND JUDICIAL INDEPENDENCE UNDER THE FEDERAL JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 142 Univ. Pa. L. Rev. 25 (1995). At page 76, Barr and Willging reported the following:

> *Case D-10.* The complaint alleged that the judge made statements in an interview aired on *60 Minutes* that violated ethical canons. Specifically, the judge allegedly expressed fear of the President, indicated that he could not be impartial in certain disputes, and criticized the Chief Justice of the United States as one who would issue ex parte orders instructing chief judges to discipline certain judges. The chief judge dismissed the complaint on the ground that these comments could reasonably be construed as mere individual disagreemtns with other public officials which did not constitute misconduct under the act. Upon review, the judicial council affirmed the chief judge's dismissal by a seven-to-six vote, with the dissenters expressing the view that the allegations were cognizable under the Act and merited further investigation.

See also, Judges Moving Away from West, LEGAL TIMES, May 22, 1995, page 6, and *Defense Bar, Federal Judiciary Clash Over Salty-Tongued Training Seminars,* LEGAL TIMES,

June 26, 1994, page 1, for other evidence of the role of Chief Justice Rehnquist in judicial ethics and discipline.

III.

THE DISCIPLINARY PROCEEDING VIOLATED DUE PROCESS AND WAS CONDUCTED IN BAD FAITH.

A. A Referee should Have Been Appointed to Hear the Factual Issues and to Determine the Applicable law.

In his Memorandum Opinion, Judge Sporkin did not refer to a single factual allegation in the amended complaint. A finding of fact must furnish enough detail to disclose the steps by which the court arrives at its conclusion. *Kelley v. Everglades Drainage District,* 319 U.S. 415, 422 (1943). It's impossible to determine upon what underlying facts Judge Sporkin relied, and whether he observed proper statutory standards. *Schneiderman v. United States,* 320 U.S. 118, 130 (1943).

Judge Sporkin ignored the stringent requirements of Rule 12(b)(6). *ACLU Foundation of So. Cal. v. Barr,* 952 F.2d 457, 467 (D.C. Cir. 1991).

A finding of attorney misconduct can not be presumed from the fact that charges are made and a suspension order is issued by the court. *Matter of Nuey,* 61 N.Y.2d 512, 463 N.E.2d 30 (1984); *In re Moffett,* 154 App. Div. 929, 139 N.Y.S. 545 (1st Dept. 1913).

B. The Decision of the Appellate Division is Clearly Erroneous, and the Judges of the Court of Appeals Denied Petitioner's Motion For Leave to Appeal in Bad Faith.

The Appellate Division states, at A-2-3, the following:

> . . . the amended complaint was a "carbon copy" of a complaint dismissed by the District Court for the Southern District of New York and that *in affirming that dismissal* the United States Court of Appeals for the Second Circuit had warned respondent that further prosecution of his claims would be frivolous and futile and might be met with costs and other sanctions . . .

(Emphasis supplied) (citations omitted).

Judge Sporkin, at A-17, actually stated that "the Plaintiff admits that the Amended Complaint he has filed with this court is a *near* "carbon copy of a complaint he previously filed in the Southern District of New York. See Complaint, dated October 18, 1994, *at p. 53"* (emphasis supplied).

Actually, the complaint at page 53, ¶ 134 concludes with the following statement: "*This complaint up to here is almost a carbon copy.*" (Italics in original).

The complaint is actually 95 pages long and contains 276 allegations — 142 additional allegations and also a Supplemental Complaint filed on May 8, 1995, with Judge Sporkins permission.

Babigian v. The Association of the Bar, 744 F. Supp. 47 (S.D. 1988), was filed in 1988; the Washington action in 1994.

The Supplemental Complaint is a declaratory action against the Judges of the New York Court of Appeals. Obviously, they were fully aware that the earlier New York action was not a "carbon copy" of the later complaint in Washington. Petitioner submitted copies of the New York complaint, the Washington complaint, and the Supplemental Complaint as exhibits to his Motion for Leave to Appeal to the New York Court of Appeals.

CONCLUSION

Pursuant to its supervisory power under Rule 10, the Court should grant this writ of certiorari by a summary reversal of the Federal decision below and the decision of the Appellate Division suspending petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, DATED FEBRUARY 11, 1998

Supreme Court - Appellate Division
Third Judicial Department

Decided and Entered: February 26, 1998

In the Matter of JOHN J. BABIGIAN, an Attorney and Counselor-At-Law.

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner;

MEMORANDUM AND ORDER

JOHN J. BABIGIAN,

Respondent.

Calendar Date: February 11, 1998

Before: Mikoll, J.P., Mercure, Crew III, Yesawich Jr. and Peters, J.J.

Mark S. Ochs, Committee on Professional Standards, Albany, for petitioner.

John J. Babigian, Albany, respondent in person.

Appendix A

Per Curiam.

Respondent was admitted to practice by this court in 1953. He resides in New York City.

By petition dated August 25, 1997, the Committee on Professional Standards charged respondent with filing a lawsuit in the United States District Court for the District of Columbia against the Chief Justice of the United States and over 60 other parties which was frivolous and served merely to harass or maliciously injure another and in which respondent knowingly advanced claims unwarranted under existing law, in violation of those provisions of the Code of Professional Responsibility prohibiting such a lawsuit (22 NYCRR 1200.33[a][1] and [2]) and prohibiting conduct prejudicial to the administration of justice and conduct which adversely reflects on an attorney's fitness to practice law (22 NYCRR 1200.3 [a] [5] and [8]). The lawsuit was dismissed in September 1995 and sanctions totalling $20,000 were imposed against respondent in favor of two defendants shortly thereafter; respondent was also enjoined from bringing any further new claims or lawsuits relating to the underlying action without the prior express permission of the District Court (Babigian v Rehnquist, 1995 WL 632062 [No. Civ A. 94-2246] and 901 F Supp 17, affd 107 F3d 922, cert denied ___US ___[Mar. 31, 1997]). In dismissing the lawsuit with prejudice, the District Court found that it was frivolous; that respondent was attempting to retry claims dating back 20 years which he had unsuccessfully litigated in other courts; that the amended complaint was a "carbon copy" of a complaint

dismissed by the District Court for the Southern District of New York and that in affirming that dismissal the United States Court of Appeals for the Second Circuit had warned respondent that further prosecution of his claims would be frivolous and futile and might be met with costs and other sanctions (see, Babigian v Association of the Bar of the City of New York, 744 F Supp 47, affd 912 F2d 462, cert denied 498 US 1012; Babigian v Association of the Bar of the City of New York, 144 F.R.D. 30, affd 990 F2d 623; Babigian v Association of the Bar of the City of New York, Docket No. 92-7903, unpublished slip opinion [Jan. 19, 1993]). The Court also noted that respondent's complaints were subject to dismissal for lack of personal jurisdiction over the vast majority of the defendants and because venue did not lie in the District of Columbia, because many of the defendants employed by the Federal government were entitled to immunity, and because respondent's claims against the defendants over whom the District Court had jurisdiction were barred by the doctrines of res judicata and collateral estoppel.

By decision dated November 17, 1997, this court granted petitioner's motion for an order declaring that no factual issues were raised by the pleadings. Respondent is collaterally estopped from relitigating in this proceeding the nature of the lawsuit he brought in District Court (see, e.g., Matter of Intemann, 165 AD2d 974). Respondent was heard in mitgation on February 11, 1998. We conclude that, to protect the public, deter similar misconduct, and preserve the reputation of the Bar, he should be suspended from practice for a period of six months (see, e.g., Matter of Mordkofsky, 232 AD2d 863, lv denied 89 NY2d 817, appeal dismissed 89 NY2d 983).

Appendix A

Mikoll, J.P., Mercure, Crew III, Yesawich Jr. and Peters, JJ., concur.

ORDERED that respondent is found guilty of the professional misconduct charged and specified in the petition; and it is further

ORDERED that respondent is suspended from the practice of law for a period of six months, effective thirty (30) days from the date of this order, and until further order of this court; and it is further

ORDERED that respondent, for the period of his suspension, is commanded to desist and refrain from the practice of law in any form either as principal or as agent, clerk or employee of another, and is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give another any opinion as to the law or its application or any advice in relation thereto; and it is further

ORDERED that respondent shall comply with the provisions of section 806.9 of this court's rules regulating the conduct of suspended attorneys.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk of the Court

APPENDIX B — PETITION OF CHARGES AND SPECIFICATIONS IN THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, DATED AUGUST 25, 1997

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD JUDICIAL
DEPARTMENT

In the Matter of **JOHN H. BABIGIAN**, an Attorney and Counselor-at-Law,

COMMITTEE ON PROFESSIONAL STANDARDS, Third Judicial Department, Petitioner,

and

PETITION OF CHARGES AND SPECIFICATIONS

JOHN H. BABIGIAN,

Respondent.

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

The Committee on Professional Standards, Third Judicial Department, by Mark S. Ochs, Chief Attorney, respectfully alleges upon information and belief that:

1. This proceeding was instituted by petitioner pursuant to Section 806.4(c)(2) of the Rules of the Appellate Division following respondent's demand for a petition of charges and his refusal to accept an admonition authorized by the Committee on July 25, 1997.

2. Respondent was admitted to practice as an attorney and counselor-at-law by an order of the Appellate Division, Third Department in 1953.

3. Respondent's address is One Christopher Street, Apartment 11-A, New York, New York 10014.

4. Respondent has been guilty of professional misconduct and conduct prejudicial to the administration of justice within the meaning of the Judiciary Law, Section 90, subdivision 2 and conduct tending to bring the legal profession into disfavor and disrepute as follows:

CHARGE I

IN VIOLATION OF DISCIPLINARY RULE 1-102(A)(5)(8) and 7-102(A)(1)(2) OF THE CODE OF PROFESSIONAL RESPONSIBILITY, RESPONDENT FILED A SUIT AND TOOK ACTION WHEN IT WAS OBVIOUS THAT SUCH ACTION SERVED MERELY TO HARASS OR MALICIOUSLY INJURE ANOTHER AND KNOWINGLY ADVANCED CLAIMS UNWARRANTED UNDER EXISTING LAW, SUCH CONDUCT BEING PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND ADVERSELY REFLECTING ON RESPONDENT'S FITNESS TO PRACTICE LAW.

Appendix B

Specification 1

Respondent instituted litigation in the United States District Court for the District of Columbia against the Chief Justice of the United States and over sixty other parties. The amended and supplemental complaints were dismissed with prejudice by District Judge Sporkin in a Decision and Order dated September 7, 1995. Judge Sporkin made the following findings:

a). Respondent commenced a frivolous lawsuit.

b). Respondent was attempting to retry claims that had been unsuccessfully litigated in other courts. He sought relief based upon claims that were over twenty years old and had been raised in at least seven different judicial proceedings.

c). The amended complaint was a near "carbon copy" of a complaint previously filed in the Southern District of New York. On appeal from dismissal of that action, the United States Court of Appeals for the Second Circuit observed that respondent was an attorney and had been fully put on notice of the intricacies in Rule 60(b). Any further prosecution of respondent's claims would be both frivolous and futile and would waste the time and resources of the court and opposing parties. Accordingly, any further attempts to prosecute the underlying claims or related claims in that court may

result in an order to pay double costs, attorneys' fees and other sanctions.

d). U.S. District Court for the District of Columbia lacked personal jurisdiction over the vast majority of defendants.

e). Venue did not lie in the District of Columbia for respondent's lawsuit.

f). The Federal judicial defendants and the defendant Department of Justice attorneys were entitled to absolute immunity.

g). Respondent's claims against the remaining defendants over which the court had jurisdiction were barred by the doctrines of res judicata and collateral estoppel.

Specification 2

In his conclusion, Judge Sporkin wrote "The Plaintiff has filed a frivolous lawsuit. This action is all the more egregious because he is an attorney and should be aware that he has brought a meritless suit that he is estopped from bringing, against defendants most of whom are protected by absolute immunity, or over whom this Court lacks jurisdiction. The Chief Justice of the United States should not be vexed with spending time and energy litigating a matter that plaintiff has lost many times over. The Amended Complaint and Supplemental Complaint will therefore be Dismissed, with prejudice. There must be an end to this baseless litigation."

Appendix B

Specification 3

Judge Sporkin directed respondent to show cause why monetary sanction should not be imposed and why respondent should not be enjoined from bringing any further claims or lawsuits related to the underlying action without the prior express permission of the court. At a hearing conducted October 3, 1995, respondent denied his action was frivolous and refused to provide the court with assurances that he would end the litigation. Respondent indicated that in all likelihood he would seek to continue to litigate the same claims. The court found respondent was unrepentant and unremorseful and gave every indication that he would continue to file frivolous, resource-wasting lawsuits. The judge referred to respondent's litigation as a "campaign of meritless serial litigation".

Specification 4

Monetary sanctions totalling $20,000 were imposed against respondent on behalf of two defendants. Additionally, respondent was enjoined from bringing any further new claims or lawsuits relating to the underlying action without the prior express permission of the court.

Specification 5

The United States Court of Appeals, District of Columbia Circuit, granted summary affirmance of Judge Sporkin's October 13, 1995 order. By order filed December 3, 1996, respondent's petition for a rehearing was denied. His petition to the United States Supreme Court for a writ of certiorari was denied.

Appendix B

Dated: Albany, New York
August 25, 1997

/s/ Mark S. Ochs
Mark S. Ochs, Chief Attorney

APPENDIX C — MEMORANDUM OPINION OF DISTRICT COURT JUDGE STANLEY SPORKIN, FILED SEPTEMBER 7, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN BABIGIAN, Plaintiff, v. WILLIAM H. REHNQUIST, Chief Justice of the United States, et al. Defendants.	FILED SEP 7- 1995 NANCY MAYER-WHITTINGTON, CLERK U.S. DISTRICT COURT Civil Action No. 94-2246 (Stanley Sporkin) 1995 WL 632062

MEMORANDUM OPINION

This is a frivolous lawsuit. The Plaintiff, a licensed attorney proceeding pro se, is attempting to retry claims in this forum that have been unsuccessfully litigated in other Courts. He now sues the Chief Justice of the United States, in addition to over sixty other individuals, ignoring the most basic principles of jurisdiction, immunity, and collateral estoppel. Furthermore, the Plaintiff seeks relief based on claims that are over twenty years old and that have been raised in at least seven different judicial proceedings. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit have both issued explicit warnings to the Plaintiff not to relitigate this matter in their Courts.

Appendix C

The Plaintiff names numerous Defendants in the Amended Complaint. They generally fall within the following categories: (1) Federal Defendants, (2) New York State Defendants, (3) Association of the Bar of the City of New York Defendants ("New York City Bar Defendants"), (4) Florida Bar Defendants, (5) Skadden, Arps, Slate, Meagher & Flom Defendants ("Skadden Defendants"), and (6) Other Defendants.[1] Several

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[1]The following are specifically named as Defendants in the Plaintiff's **Amended Complaint:**

"Federal Defendants" - William H. Rehnquist, individually and as Chief Justice of the United States; the Judicial Conference of the United States; Stephen G. Breyer, Abner J. Mikva, Jon O. Newman, Dolores K. Sloviter, Sam J. Ervin, Henry A. Politz, Gilbert S. Merritt, Richard A. Posner, Richard S. Arnold, J. Clifford Wallace, Gerald B. Tjoflat, Helen W. Nies, individually and as Chief Judges comprising the Judicial Conference of the United States; John M. Cannella, U.S. District Judge for the Southern District of New York; Ralph Winter, J. Daniel Mahoney, John M. Walker, Jr., Amalya L. Kearse, Thomas J. Meskill, J. Edward Lumbard, James L. Oakes, U.S. Court of Appeals Judges for the Second Circuit, Jo Ann Harris, Assistant Attorney General, Civil Division, U.S. Department of Justice, John Kenney, Deputy Assistant Attorney General, U.S. Department of Justice, Cynthia Rapp, Staff Attorney, United States Supreme Court,

"New York State Defendants" - Hon. Francis T. Murphy, Peter Durfee, Harold Reynolds, Michael Gentile,

additional Defendants are named in the Supplemental Complaint, including the former Governor of the State of New York and various members of the New York State

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Hal Lieberman, Haliburton Fales, Hon. Joseph W. Bellacosa.

"New York City Bar Defendants" - Association of the Bar of the City of New York, John G. Bonomi, Eleanor Jackson Piel, Stanley S. Arkin, William E. Hellerstein, Robert J. McGuire, Patrick Wall, Martin Fogelman, Powell Pierpont, Nina Rao Cameron, Jeffrey K. Brinck, Adlai Hardin, Stephen R. Kaye, Seth Rosner, Richard W. Wallach.

"Florida Bar Defendants" - The Florida Bar, Barry Richard, Norman Faulkner, E. Earle Zehmer.

"Skadden Defendants" - Skadden, Arps, Slate, Meagher & Flom, Thomas Schwarz, Jay S. Berke, Rosalie B. Shields.

"Other Defendants" - "Nervous Nellie Doe", "Horny Hellen Doe".

Judiciary.[2] The Defendants have filed Motions to Dismiss.

I. Background:

a. Amended Complaint:

The pro se Plaintiff in this case is an Attorney licensed to practice law in the State of New York. During the mid-1960's, he started a legal research service based in New York City called "Attorney's Research Inc." The Plaintiff advertised his business in various legal periodicals, offering to perform legal research for other attorneys around the country in return for a fee.

The Bars of Florida and Hawaii, as well as individual attorneys, subsequently filed complaints against the Plaintiff with the New York City Bar. They accused the Plaintiff of, among other things, advertising legal services to laymen and engaging in the unauthorized practice of law, in violation of the Canons of Professional Ethics. The New York City Bar conducted an

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[2]The following Defendants are named in the Plaintiff's **Supplemental Complaint:**

Mario Cuomo, former Governor of the State of New York; Sol Wachtler, former Chief Judge of the New York Court of Appeals; Judith S. Kaye, Richard D. Simmons, Vito J. Titone, George B. Smith, Carmen B. Ciparick, Howard A. Levine, New York Court of Appeals Judges.

investigation of the Plaintiff and, on November 7, 1973, issued an "Admonitory Letter."

On February 18, 1988, the Plaintiff filed suit against the New York City Bar in the United States District Court for the Southern District of New York. He claimed that the New York City Bar had committed various constitutional, state common law, and statutory violations during the disciplinary proceedings conducted against him some 15 years earlier. That Court dismissed the complaint after finding the statute of limitations had run. The United States Court of Appeals for the Second Circuit affirmed. Babigian v. Ass'n of the Bar of the City of New York, et. al., 744 F.Supp. 47 (S.D.N.Y. 1990), aff'd, 912 F.2d 462 (2nd Cir. 1990) (table), cert. denied, 498 U.S. 1012 (1990).

The Plaintiff later sought reconsideration of the judgement, pursuant to Fed.R.Civ.P. 60, alleging fraud and misconduct on the part of the Defendants, the District Court Judge, and the Court of Appeals Panel that had reviewed the case. The District Court denied the Plaintiff's request and the decision was again affirmed on appeal. Babigian v. Ass'n of the Bar of the City of New York, et. al., 144 F.R.D. 30 (S.D.N.Y. 1992), aff'd, 990 F.2d 623 (2nd Cir. 1993) (table).[3]

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[3]The United States Court of Appeals for the Second Circuit issued the following warning to the Plaintiff regarding possible sanctions for his conduct:

> This is appellant's seventh attempt to gain relief from alleged violations of the

Fourteenth Amendment and state common law and statutory rights that occurred nearly twenty years ago and seem to have caused little injury. Judge Cannella was tempted to impose Rule 11 sanctions but refused to do so because although, "plaintiff has completely ignored the legal standards governing relief under Rule 60(b)," the judge recognized the intricacies of Rule 60(b) and noted that pro se plaintiffs are held to a lower standard of accountability than attorneys.

We observe that Babigian is an attorney and that he has now been fully put on notice of any intricacies in Rule 60(b). He continues to ignore the legal standards governing relief under that rule. Because none of the appellees present at oral argument requested sanctions we will not impose them at this time. We hold, however, that any further prosecution of appellant's claims would be both frivolous and futile and would waste the time and resources of this Court and the appellees. Therefore, appellant should understand that any further attempts to prosecute this claim or related claims in this Court may result in an order to pay double costs, attorneys's fees and any other sanctions deemed to be appropriate at the time. Babigian v. Association of the Bar of the City of New

Appendix C

The Plaintiff has since written letters to the Chief Justice of the United States and other Federal Government Officials asking for an investigation into his allegations. The Plaintiff apparently received a reply from a Supreme Court staff attorney, but not the action he requested.

The Plaintiff admits that the Amended Complaint he has filed with this Court is a near "carbon copy" of a complaint he previously filed in the Southern District of New York. See Complaint, dated October 18, 1994, at p. 53. The only difference between the two documents is that the Plaintiff has raised additional claims against certain Defendants not identified in the previous action.[4]

York, Docket No. 92-7903, slip op. at 2-3 (2nd Cir. Jan 19, 1993) (unpub.)[.]

[4]The Plaintiff has named the following Defendants in both the instant Amended Complaint and his previous lawsuit filed in the Southern District of New York: The Association of the Bar of the City of New York and several of its members, The Florida Bar and two of its members, the Chief Justice of the Appellate Division of the State of New York, and several employees of the New York State Court system.

The Plaintiff has named the following Defendants only in the instant Amended Complaint and not in his previous lawsuit filed in the Southern District of New York: members of the law firm Skadden, Arps, Slate, Meagher and Flom that represented the New York City Bar during the previous litigation, a member of the Florida Bar, the Chief Justice of the United States, the Chief

With respect to the Defendants named in both the Amended Complaint and the previous lawsuit, the Plaintiff repeats his claims that the New York City Bar committed Constitutional, statutory, and state common law violations during disciplinary proceedings it conducted against the plaintiff over 20 years ago. Regarding the Defendants named only in the Amended Complaint, the Plaintiff alleges that they either conspired to deprive him of relief during his previous litigation or failed in their duty to investigate his allegations further.

The Plaintiff now requests trial by jury and seeks damages in the amount of $1,000,000.00 from the Chief Justice of the United States, as well as other preliminary and injunctive relief.

b. Supplemental Complaint:

The Plaintiff's allegations in the Supplemental Complaint derive from his past attempt to become a New York City Housing Court Judge. After failing in that pursuit, he now asserts that the New York statute defining the selection process for that position was constitutionally flawed from the outset.[5]

Judges who comprise the Judicial Conference of the United States, as well as other individuals.

[5]The statute at issue, New York City Civil Court Act § 110(f), provides that Housing Judges are to be appointed by the State's Chief Administrative Judge. The

Appendix C

Beginning in 1986, the Plaintiff litigated this identical claim in various lawsuits filed with the New York State and Federal Courts. The Supreme Court for New York County originally ruled against the Plaintiff after finding the statute constitutional. The New York Supreme Court, Appellate Division, First Department, and the Court of Appeals of New York both affirmed. Babigian v. Wachtler, 133 Misc.2d 111, 506 N.Y.S.2d 506 (1986), aff'd, Babigian v. Wachtler, 126 A.2d 445, 510 N.Y.S.2d 473 (1987), aff'd, Babigian v. Wachtler, 69 N.Y.2d 1012, 517 N.Y.S.2d 905 (1987).

The Plaintiff next filed suit in the United States District Court for the Southern District of New York, claiming that certain members of the New York State Judiciary had denied him due process during his appeals of this litigation, in violation of 42 U.S.C. § 1983. That Plaintiff also contended that the Governor of New York had vetoed, in bad faith, certain legislation related to the New York City Housing Court Judge positions. That Court dismissed the suit, finding that the Plaintiff lacked standing. Babigian v. Cuomo, No. 88 Civ. 8545 (1989 WL 31699) (S.D.N.Y. March 27, 1989). The Plaintiff then attempted to re-appeal the 1987 decision by the New

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Plaintiff claims this violates the doctrine of separation of powers under the New York Constitution. Although, Plaintiff claims the cause of action in the Supplemental Complaint arises under 42 U.S.C. § 1983, it appears to arise solely under New York State law. While the Court need not reach the issue, there are serious questions as to whether it has subject matter jurisdiction over a number of claims in the complaint.

York Supreme Court, Appellate Division, First Department. That action was barred, however, by the doctrine of res judicata. Babigian v. Wachtler, 181 A.D.2d 640, 582 N.Y.S.2d 14 (1992).

In the instant Supplemental Complaint, the Plaintiff re-raises claims against many of the same Defendants that he named in his previous litigation. The Plaintiff specifically asserts that the Defendants denied him his civil rights, in violation of 42 U.S.C. § 1983, by blocking his access to the courts, causing injury to his reputation as an attorney, and rendering "false and corrupt decisions." See Plaintiff's Supplemental Complaint at p. 17-18. The Plaintiff seeks relief from the Court in the form of a Declaratory Judgment to this effect.

Analysis:

II. THIS COURT LACKS PERSONAL JURISDICTION OVER THE VAST MAJORITY OF THE DEFENDANTS NAMED IN THIS LAWSUIT BECAUSE THEY DO NOT RESIDE OR MAINTAIN THEIR PRIMARY PLACE OF BUSINESS IN THE DISTRICT OF COLUMBIA AND ARE NOT SUBJECT TO THE DISTRICT OF COLUMBIA'S LONG ARM STATUTE.

Of the sixty plus Defendants named by the Plaintiff in this lawsuit, all but a small fraction reside and work in locations outside of the District of Columbia. Included

within this group are all of the New York State Defendants, New York City Bar Defendants, Florida Bar Defendants, and Supplemental Complaint Defendants. In addition, most of the Federal Defendants and Skadden Defendants reside and work in locations other than in the District of Columbia.

The only means for obtaining personal jurisdiction over these Defendants, therefore, is via the District of Columbia's Long Arm statute. D.C. Code § 13-423(a)(1)-(4).[6] See Reuber v. United States, 750 F.2d 1039, 1049

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[6]D.C. Code § 13-423(a)(1)-(4) provides:

> A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's –
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> (1) transacting any business in the District of Columbia;
> (2) contracting to supply services in the District of Columbia;
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the

(D.C. Cir. 1984); Dickson v. United States of America, et al., 831 F.Supp. 893 (D.D.C. 1993). Under this statute, personal jurisdiction may be exercised over individuals for claims arising from business transactions, contracts to provide services, or tortious injuries that took place in the District of Columbia. The general rule is that a Plaintiff has the burden of showing that all the requirements of the Long Arm statute have been met before personal jurisdiction can attach. Reuber, supra, at 1552. Mere conclusory statements that the Defendants engaged in a conspiracy will not alone suffice. Naartex Consulting Corp. v. Watt, 722 F.2d 779, 786 (D.C. Cir. 1983), cert den., 467 U.S. 1219 (1984).

In this case, the Plaintiff fails even to allege that any of the above-described Defendants had contacts with the District of Columbia, as defined by D.C. Code § 13-423(a)(1)-(4). Accordingly, the Plaintiff has not met his burden to show that the Long Arm statute applies, and the Court therefore does not have personal jurisdiction over the Defendants who do not reside or maintain their principal place of business in the District of Columbia.

District of Columbia.

Appendix C

III. VENUE DOES NOT LIE IN THE DISTRICT OF COLUMBIA FOR THIS LAWSUIT.

28 U.S.C. § 1391(b) defines where venue is proper for civil suits in which jurisdiction is not based on diversity of citizenship. It provides that such lawsuits may only be brought in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

In this case, all of the Defendants do not reside within the same district. The Plaintiff has named Defendants who live in such diverse locations as New York, Florida, and the Washington, D.C. metropolitan area. In addition, a substantial part of the alleged events giving rise to the Plaintiff's claims did not take place in the District of Columbia. The Plaintiff's claims regarding the actions of the New York City Bar and the New York City Housing Court clearly focus on events that took place in New York. Venue for this lawsuit, therefore, is improper in the District of Columbia, pursuant to 28 U.S.C. § 1391(b)(1)-(2).

Appendix C

IV. THE FEDERAL JUDICIAL DEFENDANTS AND THE DEFENDANT DEPARTMENT OF JUSTICE ATTORNEYS ARE ENTITLED TO ABSOLUTE IMMUNITY FROM THE PLAINTIFF'S CLAIMS.

The Supreme Court has held that Judges have absolute immunity from lawsuits for judicial acts taken within their Court's jurisdiction.- Cleavinger v. Saxner, 474 U.S. 193 (1985). This is because of the special nature of a Judge's responsibilities within the government. Butz v. Economou, 438 U.S. 478, 508-512 (1988); Pierson v. Ray, 386 U.S. 547 (1967). Absolute immunity for Judges exists even if the judicial conduct was in error or exceeded the Judge's authority. Stump v. Sparkman, 435 U.S. 349, 358 (1978).

Absolute immunity has been extended to others who perform functions closely associated with the judicial process, such as prosecutors, witnesses, and grand jurors. See Butz v. Economou, supra, at 513; Yaselli v. Goff, 275 U.S. 503 (1927); Imbler v. Pachtman, 424 U.S. 409 (1976); Briscoe v. LaHue, 460 U.S. 325 (1983). In Imbler v. Pachtman, the Supreme Court stated that:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the

> prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by the public trust.

Id. at 422-23.

In this case, the Chief Justice of the United States and the Chief Judges comprising the Judicial Conference of the United States are entitled to absolute immunity from the Plaintiff's lawsuit by virtue of their status as Judges. The Defendant Department of Justice attorneys who elected not to initiate an investigation into the Plaintiff's allegations are also protected by absolute immunity because they were carrying out their duties as government officials.

V. THE PLAINTIFF'S CLAIMS AGAINST THE REMAINING DEFENDANTS OVER WHICH THIS COURT HAS JURISDICTION ARE BARRED BY THE DOCTRINES OF RES JUDICATA (CLAIM PRECLUSION) AND COLLATERAL ESTOPPEL (ISSUE PRECLUSION).[7]

The Plaintiff's claims against the remaining Defendants that the Court may have jurisdiction over are barred by the related doctrines of res judicata and collateral estoppel.[8] These doctrines are designed to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate." Montana v. United States, 440 U.S. 147, 153-54 (1979). They also protect parties from the expense and burdens associated with multiple lawsuits, conserve judicial resources, and reduce the possibility of inconsistent decisions. United States v. Mendoza, 464 U.S. 155, 158-59 (1984); Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981).

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[7]The doctrine of Res Judicata is also referred to as "Claim Preclusion" and Collateral Estoppel as "Issue Preclusion." See 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4402 (1981).

[8]Although the Defendant Law Firm Skadden, Arps, Slate, Meagher, and Flom has offices located within the District of Columbia, the Plaintiff has not alleged specific grounds for the Court to exercise jurisdiction over this firm or its employees in this lawsuit.

Appendix C

Under res judicata, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). Collateral estoppel, or issue preclusion, similarly bars "relitigation of [an] issue in a suit on a different cause of action involving a party to the first case." Id. at 94.

There are three conditions that must be satisfied for collateral estoppel to apply. See, e.g., Otherson v. Department of Justice, 711 F.2d 267, 273 (D.C.Cir. 1983). First, the issue to be precluded must have actually been litigated or contested by the parties and submitted for judicial determination. Second, the issue must have been determined by a court of competent jurisdiction in the first trial. Third, the preclusion in the second case must not work an unfairness on the party. See Otherson, 711 F.2d at 273; Yamaha of America v. United States of America, 961 F.2d 245 (D.C. Cir. 1992); Jack Faucett Associates v. AT&T, 744 F.2d 118 (D.C. Cir. 1984). See also Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 333 (1971).

In this case all three conditions necessary to invoke collateral estoppel do apply. First, the Plaintiff is trying to relitigate claims and issues that he previously, but unsuccessfully, raised in the Southern District of New York.[9] He explicitly admits that the first 53 pages of the

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[9]See Babigian v. Ass'n of the Bar of the City of New York, et. al., 744 F.Supp. 47 (S.D.N.Y. 1990), aff'd, 912 F.2d 462 (2nd Cir. 1990) (table), cert. denied, 498

instant Complaint are identical to the complaint that he filed in that Court. Furthermore, the Plaintiff attempts to reassert issues relating to disciplinary actions that were taken by the New York City Bar over twenty years ago. He also requests essentially the same relief that he sought in the previous lawsuit.

Second, the claims and issues raised by the Plaintiff in this action have already been litigated before Courts of competent jurisdiction. Third, precluding the Plaintiff from reasserting these same issues in this forum would not be unfair to him. Indeed, to allow him to proceed on the record in this case would be a mockery of justice.

Although the Plaintiff has named additional Defendants in this action who were not named in his New York lawsuits, the doctrine of collateral estoppel, or issue preclusion, still applies. The traditional requirement of "mutuality" between the parties or their privies has been extended to prevent a determined litigant from retrying identical issues indefinitely, "as long as the supply of unrelated defendants holds out." Parklane Hosiery, 439 U.S. at 328, citing, Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952). See also Standefer v. United States, 447 U.S. 10, 24 (1980); Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 333 (1971).

U.S. 1012 (1990). See also Babigian v. Ass'n of the Bar of the City of New York, et. al., 144 F.R.D. 30 (S.D.N.Y. 1992), aff'd, 990 F.2d 623 (2nd Cir. 1993) (table).

Appendix C

In McLaughlin v. Bradlee, 803 F.2d 1197, 1204-05 (D.C. Cir. 1986), the Court of Appeals stated:

> Invocation of the doctrine is no longer restricted to those who were parties to the first litigation or their privies, for it has come to be widely accepted that usually little good and much harm can come from allowing a determined plaintiff to retry the same issues in exhausting fashion against successive defendants.

In McLaughlin, the appellant had filed four similar lawsuits in various State and Federal Courts, claiming that certain newspaper reporters and State officials had violated his constitutional right to privacy during a Federal investigation. The lawsuits raised essentially identical claims, but did not name the exact same defendants in each action.

In this case, the Plaintiff is attempting to do exactly what McLaughlin precludes. He seeks to relitigate claims against the New York City Bar that were previously heard and judged by a Court of competent jurisdiction. His decision to name different parties in this action should not be permitted to defeat the doctrine of collateral estoppel. Because the three conditions necessary to invoke collateral estoppel apply in this case, and because plaintiff's naming additional defendants does not avoid collateral estoppel, Plaintiff will be barred from reasserting the same claims and issues in this forum. See Otherson, 711 F.2d at 273; McLaughlin, 803 F.2d at 1204-05.

Appendix C

VI. Conclusion:

The Plaintiff has filed a frivolous lawsuit. This action is all the more egregious because he is an attorney and should be aware that he has brought a meritless suit that he is estopped from bringing, against defendants most of whom are protected by absolute immunity, or over whom this Court lacks jurisdiction. The Chief Justice of the United States should not be vexed with spending time and energy litigating a matter that plaintiff has lost many times over.

The Amended Complaint and Supplemental Complaint will therefore be Dismissed, with prejudice. There must be an end to this baseless litigation. What plaintiff hopes to accomplish by endlessly prosecuting the same baseless claims is difficult to discern. As a lawyer, the plaintiff must realize that the Chief Justice and the other judicial officers whom he has sued cannot be held answerable for their judicial acts in the lawsuits he has brought. He has already caused precious legal resources to be spent while he litigated his claims without success in the federal and state courts of New York. Having exhausted his legal rights in that jurisdiction, he now has selected the District of Columbia to start his legal assaults over again. This he will not be permitted to do. Prior Courts that have dismissed his vexatious litigation have been more than charitable in not assessing monetary sanctions against him. But the time has come to put an end to plaintiff's vexatious and frivolous litigation. Plaintiff will be ordered to show cause within thirty days as to why he should not be monetarily sanctioned for his

baseless actions.[10] Such sanctions may include assessments of Court costs and attorneys fees against him. The Plaintiff is also ordered to show cause as to why non-monetary sanctions should not be issued against him. Such sanctions may include imposing an injunction preventing the plaintiff from filing any further claims based on the facts underlying the causes of action presented in this case. An appropriate Order accompanies this Opinion.

DATE: September 6, 1995

/s/ Stanley Sporkin
Stanley Sporkin
United States District Court

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[10]The Court has the power to assess sanctions pursuant to Fed. R. Civ. P. 11(b), 1(b)(1), 11(b)(2) and 11(c)(1)(B).

APPENDIX D — DECISION OF THE NEW YORK COURT OF APPEALS DENYING MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL, DATED JULY 9, 1998

State Of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of July 1998

Present, HON. VITO J. TITONE, *Senior Associate Judge, presiding.*

Mo. No. 776

In the Matter of John H. Babigian, an Attorney and Counselor-at-Law.

Committee on Professional Standards,

Respondent;

John H. Babigian,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Appendix D

Chief Judge Kaye and Judge Bellacosa took no part.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX E — NOTICE OF MOTION FOR LEAVE TO APPEAL IN THE COURT OF APPEALS, STATE OF NEW YORK, DATED MARCH 30, 1998

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of JOHN H. BABIGIAN an
Attorney and Counselor-at-Law,

Committee on Professional Standards,
Third Judicial Department,

Petitioner-Appellee

and

JOHN H. BABIGIAN,

Respondent-Appellant

NOTICE OF MOTION
FOR LEAVE TO APPEAL

SIRS:

PLEASE TAKE NOTICE, that upon the affirmation of John H. Babigian dated March 30, 3998 and exhibits annexed thereto, including the Memorandum and Order of the Appellate Division: Third Department decided and entered February 26, 1998 which suspended respondent from the practice of law for six months, Respondent-Appellant will move this court at the Courthouse, 20 Eagle Street, Albany, New York 32207, on April 20, 1998 at 10:00 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting

Appendix E

Respondent-Appell ant leave to appeal to the Court of Appeals, and for such other and additional relief as the court may deem just and proper.

NOTICE of entry of the February 26, 3998 decision was served on respondent by petitioner on March 2, 1998.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214 answering papers, if any, must be served at least seven (7) days before the return date of the motion.

Dated: New York, New York
March 29, 1998

Yours, etc.

JOHN H. BABIGIAN
Respondent Pro Se
One Christopher Street
Apt. 11-A
New York, NY 10034-3580
(212) 374-8044

Appendix E

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of JOHN H. BABIGIAN an
Attorney and Counselor-at-Law,

Committee on Professional Standards,
Third Judicial Department,

Petitioner-Appellee

and

JOHN H. BABIGIAN,

Respondent-Appellant

AFFIRMATION IN SUPPORT OF
MOTION FOR LEAVE TO APPEAL

JOHN H. BABIGIAN, an attorney duly admitted to practice before the Courts of the State of New York, affirms under penalty of perjury the following:

1. I am fully familiar with the facts and circumstances set forth herein.

2. On February 26, 1998 the Appellate Division: Third Department suspended me from the practice of law for six months on the sole basis that I filed a frivolous lawsuit in the Federal District Court of the District of Columbia in 1994 before Judge Stanley Sporkin.

Appendix E

3. This affirmation is submitted in support of the instant motion for an Order, pursuant to CPI,R 5602(a)(3)(i) and Court Rule 500.11(d) granting Respondent-Appellant leave, to appeal from an order of the Appellate Division: Third Department dated February 26, 1998 suspending respondent from the practice of' law.

QUESTIONS PRESENTED

4. The specific questions presented by this appeal are:

A. When an attorney waives in writing his right to confidentiality and demands a public hearing, can the court deny such a request absent good cause? (*Matter of Capoccia* 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983)).

B. Did the proceedings below constitute a forbidden intrusion of free expression under the First Amendment, and also a bad faith prosecution? (*Gentile v. State Bar of Nevada,* 501. U.S. 3030, 1038 (1991) and *Wilson v. Thompson* 593 F.2d 1375 (5th Cir. 1975)).

C. Was respondent afforded due process? (*Selling v. Radford,* 243 U.S. 46, 51 (1936) ; *In Re Ruffalo,* 390 U.S. 544 (1968); *Blackledge v. Perry,* 437 U.S. 21, 25-28 (3973) ; *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 164 (1954)).

D. Can an attorney be suspended wi thout an adjudication of guilt supported by a record of evidence adduced at an adversarial hearing? (*Matter of Nuey,* 61 N.Y.2d 513, 474 N.Y.S.2d 714, 463 N.E.2d 30 (3984) and *Matter of Goodman,* 3-99 N.Y. 343, 145, 92 N.B. 211 (1910).

Appendix E

E. Did petitioner's factual and legal contentions constitute an abuse of discretion as a matter of law? (*Del Bello v. Westchester County Bar Association,* 39 N.Y.2d 466, 280 N.Y.S.2d 651, 277 N.E.2d 579 (1967))

F. Where the petition of charges is based on a letter of admonition, which requires the Grievance Committee to produce clear and convincing evidence in support of its contentions, shoul-d the decision below be vacated if no such evidence. exists, and petitioner falsely states that respondent's evidence doesn't constitute "specific responses to the Chief Attorney's inquiry and the findings. of Judge Sporkin contained therein?" (*In Re Moffett,* 3.54 App. Div. 929, 139 N.Y.S. 545 (1913)).

JURISDICTIONAL STATEMENT

5. Jurisdiction in the Court of Appeals is predicated on CPLR 55602 (a) (1) (i) in that this is an appeal from an Order which finally determines that action and is not appealable as of right. The Appellate Division Order being appealed from finally determines the action as it suspends respondent from the practice of law for six months.

BACKGROUND OF THIS MOTION

6. The background of this proceeding can I)est be demonstrated by examining the correspondence between petitioner and respondent. There were no hearings before the Committee, the Appellate Division refused to appoint a referee, and the hearing in mitigation before the Court was not transcribed:

Appendix E

7. Respondents' position is clearly set forth in the unfiled Petition for a Writ of Certiorari, Exhibit "D" at A-46-63, in the form of an advertisement placed in the Washington Legal Times prior to the appeal. Judge Stanley Sporkin's Memorandum opinion, filed September 7, 3995 is set forth in the Petition at A- 6-20.

8. As to whether the 1988 Federal action in New York is a "Carbon Copy" of the 1994 Federal action in Washington, simply look and thumb the pages of Exhibit "All and then Exhibit "C".

WHEREFORE, for the reasons set forth herein, it is respectfully submitted that the instant motion be granted.

Dated: New York, New York,
March 30, 1998

s/ John H. Babigian
JOHN H. BABIGIAN

APPENDIX F — LETTER TO MR. BABIGIAN FROM THE STATE OF NEW YORK COMMITTEE ON PROFESSIONAL STANDARDS, JUNE 23, 1997

STATE OF NEW YORK
COMMITTEE ON PROFESSIONAL STANDARDS
THIRD JUDICIAL DEPARTMENT
A.E. SMITH OFFICE BUILDING, 22ND FLOOR
P.O. BOX 7013, CAPITOL STATION ANNEX
ALBANY, NY 12225-0013

CONFIDENTIAL

June 23, 1997

John H. Babigian, Esq.
One Christopher Street
Apartment 11-A
New York, NY 10014

Dear Mr. Babigian:

We are in receipt of a copy of your letter to Chairperson Galante dated June 18, 1997. Ms. Galante has asked me to respond to your letter.

You are correct that the inquiry was first forwarded to you on February 4, not March 4.

You refer to a telephone conversation which you "transcribed". if that means you tape recorded the conversation, we ask that you confirm this fact in writing.

I did not, in our conversation, reveal that Judge Bellacosa and

Appendix F

another individual filed complaints against you. What I advised was that this matter had been forwarded to my office for handling by the First Departmental Grievance Committee. As the documentation provided did not include a complaint against you but rather documents from court proceedings, a Chief Attorney's inquiry was authorized by the Committee on Professional Standards.

If you have copies of complaint letters against you, please feel free to forward them to us.

I gather from your most recent letter that you do not intend to submit specific responses to the Chief Attorney's Inquiry and the findings of Judge Sporkin contained therein. Accordingly, we will be completing our investigation based upon the materials in our possession at this time and will present same to the Committee for its consideration.

Very truly yours,

Mark S. Ochs
Chief Attorney
MSO/ch

cc: Joyce M. Galante, Chairperson

APPENDIX G — NOTICE OF DISCIPLINARY ACTION FROM THE STATE OF NEW YORK COMMITTEE ON PROFESSIONAL STANDARDS, DATED JUNE 23, 1997

STATE OF NEW YORK
COMMITTEE ON PROFESSIONAL STANDARDS
THIRD JUDICIAL DEPARTMENT
A.E. SMITH OFFICE BUILDING, 22ND FLOOR
P.O. BOX 7013, CAPITOL STATION ANNEX
ALBANY, NY 12225-0013

CONFIDENTIAL

June 23, 1997

John H. Babigian, Esq.
One Christopher Street
Apartment 11-A
New York, NY 10014

Re: **Notice of Disciplinary Action**

Dear Mr. Babigian:

The Committee on Professional Standards, Third Judicial Department, has completed its investigation arising out of the Chief Attorney's Inquiry dated February 4, 1997.

Based upon the inquiry, your responses thereto and investigation by the Committee staff, the Committee has determined your professional conduct was improper in the following respects:

> You instituted litigation in the United States District Court for the District of Columbia against the Chief Justice of the United States and over sixty other

parties. The amended and supplemental complaints were dismissed with prejudice by District Judge Sporkin in a Decision and order dated September 7, 1995. Judge Sporkin made the following findings:

a). You commenced a frivolous lawsuit.

b). You were attempting to retry claims that had been unsuccessfully litigated in other courts. You sought relief based upon claims that were over twenty years old and had been raised in at least seven different judicial proceedings.

c). The amended complaint was a near "carbon copy" of a complaint previously filed in the Southern District of New York. On appeal from dismissal of that action, the United States Court of Appeals for the Second Circuit observed that respondent is an attorney and has been fully put on notice of the intricacies of Rule 60(b). Any further prosecution of respondent's claims would be both frivolous and futile and would waste the time and resources of the court and opposing parties. Accordingly, any further attempts to prosecute the underlying claims or related claims may result in an order to pay double costs, attorneys' fees and other sanctions.

d). U.S. District Court for the District of

Appendix G

Columbia lacked personal jurisdiction over the vast majority of defendants.

e). Venue did not lie in the District of Columbia for your lawsuit.

f). The Federal judicial defendants and the defendant Department of Justice attorneys were entitled to absolute immunity.

g). Your claims against the remaining defendants over which the court had jurisdiction were barred by the doctrines of res judicata and collateral estoppel.

In his conclusion, Judge Sporkin wrote "The Plaintiff has filed a frivolous lawsuit. This action is all the more egregious because he is an attorney and should be aware that he has brought a meritless suit that he is estopped from bringing, against defendants most of whom are protected by absolute immunity, or over whom this Court lacks jurisdiction. The Chief Justice of the United States should not be vexed with spending time and energy litigating a matter that plaintiff has lost many times over. The Amended Complaint and Supplemental Complaint will therefore be Dismissed, with prejudice. There must be an end to this baseless litigation."

Judge Sporkin directed you to show cause why monetary sanction should not be imposed and why you should not be enjoined from bringing any further claims or lawsuits related to the underlying action

without the prior express permission of the court.

At a hearing conducted October 3, 1995, you denied your action was frivolous and refused to provide the court with assurances that you would end the litigation. You indicated that in all likelihood you would seek to continue to litigate the same claims. The court found you were unrepentant and unremorseful and gave every indication that you would continue to file frivolous, resource-wasting lawsuits. The judge referred to your litigation as a "campaign of meritless serial litigation".

Monetary sanctions totalling $20,000 were imposed against you on behalf of two defendants. Additionally, you were enjoined from bringing any further new claims or lawsuits relating to the underlying action without the prior express permission of the court.

The United States Court of Appeals, District of Columbia Circuit, granted summary affirmance of Judge Sporkin's October 13, 1995 order. By order filed December 3, 1996, your petition for a rehearing was denied. Your petition to the United States Supreme Court for a writ of certiorari was denied.

The aforesaid conduct is violative of Disciplinary Rules I102 (A) (5) (8) and 7-102 (A) (1) (2) of the Code of Professional Responsibility, copies of which are enclosed.

You were advised by letter of August 1, 1997, of the intention of the Committee to admonish you for the foregoing

misconduct. Since you have failed to show cause why such admonition should not issue pursuant to Section 806.4(c) of the Rules of the Appellate Division, Third Department, you are hereby admonished for the foregoing acts of professional misconduct.

Please note, your conduct as noted above may be brought to the attention of the Committee or the Court should subsequent acts of professional misconduct be reviewed by the Committee.

Very truly yours,

Joyce M. Galante, Chairperson
Committee on Professional Standards
Third Judicial Department
JMG/MSO/ch
Enclosures Certified Mail - Return Receipt
P 224 542 207 & Regular Mail

APPENDIX H — LETTER FROM MR. BABIGIAN MS. JOYCE M. GALANTE, DATED JUNE 18, 1997

John H. Babigian
One Christopher Street
Apartment 11-A
New York, NY 1,0014

June 18, 1997

Ms. Joyce M. Galante
Chairperson
Committee on Professional Standards
Third Judicial Department
53 Second Street Troy, New York 12181

Re: Matter of John H. Babigian
Ochs Letter - 6/5/97

Dear Ms. Galante:

On June 7, 1997, 1 received the attached letter from Mark S. Ochs.

First, Mr. Ochs' inquiry was forwarded to me on February 4, not March 4. The inquiry is enclosed as Exhibit "A." second, he claims that I have not responded to his inquiry. Pursuant to a telephone call. on February 26, 1997, 1 sent a letter and enclosures by Federal Express on March 8, 1997 (Exhibit IIBII). Those enclosures are included herein. Third, on May 5, 1997, I sent a follow-up letter to Mr. Ochs (Exhibit "C").

In our telephone conversation, which I initiated and transcribed, Mr. Ochs revealed that Judge Joseph Bellacosa and another individual had filed complaints against me. Exhibit "All

in my Washington complaint accuses the New York Court of Appeals of rendering a false decision involving New York City Housing Court judges. Ten days after filing the Washington complaint, the Court of Appeals rendered another false decision involving the Housing Court judges. Mr. Ochs stated that he had a copy of the complaint and had read the Exhibit "All therein, but that he did not have a copy of the supplemental complaint for declaratory relief against the Court of Appeals judges regarding the second Housing Court decision. That's why I sent the supplemental complaint to him.

Mr. Ochs demands a written statement of my position in regard to paragraph four which states that "respondent violated Disciplinary Rules 1-102 (A)(4)(5)(8) and 7-102 (A)(1)(2)(5) of the Code of Professional Responsibility." There isn't a single specification of how I violated any of the above code rules.

You can now understand why I informed Mr. Ochs that I would send him the Supplemental Complaint, the Petition for a Writ of Certiorari, and other material, which clearly explains my position, and then he could take it from there.

The only specification of frivolous conduct in the Washington action is Judge Stanley Sporkin's claim that I am a lousy legal researcher.

> "In filing the complaint, the Plaintiff ignored the most basic principles of jurisdiction, immunity and collateral estoppel." (Petition, A52)
>
> "In this case, the Chief Justice of the United States and the Chief Judges compromising the Judicial Conference of the United States are entitled to

> absolute immunity from the Plaintiff's lawsuit by virtue of their status as judges. The Defendant Department of Justice attorneys who elected not to initiate an investigation into the Plaintiff's allegations are also protected by absolute immunity *because they were carrying out their duties as government officials."* (emphasis supplied) (Petition, A-53)

Now read the text of my advertisement in the Legal Times of June 16, 1996, Petition, A-48 to A-63, and you be the judge of whether I have adequately answered Mr. Ochs' inquiry, and filed a frivolous action in Washington. At the sanctions hearing on October 3, 1995, I asked Judge Sporkin to specify which of my eleven causes of action were frivol.ous; he changed the subject (Petition, A-25-27). When I repeated the question, he let the cat out of the bag:

> "MR. BABIGIAN: Sir, excuse me, sir. The , issue right here right now is whether my 11 causes of action are all frivolous. For the record, sir, would you please state that all my causes of action are frivolous?
>
> "THE COURT: I have stated what I've said in my opinion, and I am not answering questions to you.
>
> "Now, let me point out something to you, that what does concern me, as expressed by the Assistant United States Attorney, that actions such as this are taking a lot of our time and energy. They are frivolous. They've got to be stopped. It doesn't do

> you well as a member of the bar to say it or twist it, you just don't go and sue the Chief Justice of the United States." (Petition, A-35)

My "response in particular" to the inquiries set forth in inquiry number 5 is to incorporate by reference the Petition for a Writ of Certiorari, the Amended Complaint-, the Supplemental Complaint, all the defendants Memoranda of Law in support of their motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, and my Affirmations in Opposition to the above motions, all the Motions for Summary Affirmance of the appeal and my Affirmations in opposition to those motions, and Professor Anthony D'Amato's article on judicial misconduct, cited in my March 8, 1997 letter to Mr. Ochs.

Mr. Ochs is also willfully cockeyed. At inquiry 5-C, quoting Judge Sporkin, he states that, "The amended complaint was a near 'carbon copy' of a complaint previously filed in the Southern District of New York." At page 5 of Sporkin's September 7, 1995 Memorandum Opinion, he bases that statement as follows: "*See* complaint, dated October 18, 1994, at page 53.11 A cursory examination reveals that the complaint is 95 pages in length (Appendix, A-170), and from A-172 to A-248 contains letter exhibits which are obviously not part of the initial complaint filed in the Southern District. And, of course, add the Supplemental Complaint, and the last four causes of action listed at A-4.

To repeat, Mr. Ochs had the complaint when he wrote the inquiry letter of February 4, 1997. And obviously he discussed this case with Hal Lieberman, the Chief Counsel in New York City, who received the two complaint letters and forwarded

them to Mr. Ochs because he is a defendant in the Washington action.

In 1985, your illustrious predecessor, Carroll J. Mealey, wrote as follows:

> "Failure to cooperate with a disciplinary investigation is a violation of DR 1-102(A) (5) and (6). In my six years of experience as a member of the Committee on Professional Standards of the Third Judicial Department, I found this violation, unaccountably, to be a most common basis for discipline. of the nineteen final disciplinary decisions rendered by the Appellate Division, Third Department in 1983, at least eight involved this violation. often, the underlying charges were relatively minor violations that would have evoked only mild sanctions but for the failure to cooperate with the Committee. My own perception of the reason for the recurrence of this charge is the bar's own lack of familiarity with the entities that administer discipline at the first level, and the procedures by which they do it. Local bar associations and the disciplinary committees themselves have an educational job to do in this area." (36 Syracuse Law Review 493, 513).

Please educate Mr. Ochs and tell him to disgorge those two complaint letters.

Yours,
John H. Babigian

cc: Mark Ochs

APPENDIX I — LETTER TO MR. BABIGIAN FROM THE STATE OF NEW YORK COMMITTEE ON PROFESSIONAL STANDARDS, DATED JUNE 5, 1997

STATE OF NEW YORK
COMMITTEE ON PROFESSIONAL STANDARDS
THIRD JUDICIAL DEPARTMENT
A.E. SMITH OFFICE BUILDING, 22ND FLOOR
P.O. BOX 7013, CAPITOL STATION ANNEX
ALBANY, NY 12225-0013

CONFIDENTIAL

June 5, 1997

John H. Babigian, Esq.
One Christopher Street
Apartment 11-A
New York, NY 10014

Dear Mr. Babigian:

Despite the granting of extensions for submission of your response to our inquiry forwarded to you on March 4, 1.997, to date, we have not received your written response.

Absent same within two weeks of the date of this letter, this matter will be presented to the Committee based upon the information in our possession and without benefit of what you may wish to offer in response.

The Committee will also be advised of your apparent failure to cooperate with staff's investigation.

We await your response.

Appendix I

Very truly yours,

Mark S. Ochs
Chief Attorney
MSO/ch

APPENDIX J — FROM MR. BABIGIAN TO MARK S. OCHS, DATED MAY 5, 1997

John H. Babigian
One Christopher Street
Apartment 11-A
New York, NY 10014

May 5, 1997

Mark S. Ochs, Esq.
Committee on Professional Standards
Third Judicial Department
A.E. Smith Office Building
Albany, N.Y. 12225-0013

Re: inquires to
John Babigian

Dear Mr. Ochs:

Without the complaint letters of Judge Joseph Bellacosa and the individual who sent you the Washington Federal decisions, how do you expect me to give you a detailed response to each of your queries?

There is no statute of limitations on lawyer misconduct. if you commit a serious crime, you can be disciplined accordingly without a criminal conviction. in addition to the serious misconduct which is concretely documented in the first 53 pages of the complaint, there is serious misconduct by the counsel and the former president of The Association of the Bar.

At a lecture on legal ethics prior to filing the complaint, I cross-examined Hal Lieberman regarding the disciplinary action against me. I submit that the tape recording of that exchange

and its background clearly indicates that he lied when he denied that he knew of the disciplinary action against me and the Federal actions in New York.

I think we should have a conference.

Yours,

John Babigian

APPENDIX K — LETTER FROM MR. BABIGIAN TO MARK S. OCHS, DATED MARCH 8, 1997

John H. Babigian
One Christopher Street
Apartment 11-A
New York, NY 10014

March 8, 1997

Mark S. Ochs, Esq.
Chief Attorney
Committee on Professional Standards
Third Judicial Department
A.E. Smith Office Building, 22nd Floor
Albany, N.Y. 12225-0013

Re: Inquiry To
John Babigian

Dear Mr. Ochs:

Enclosed is a copy of the Supplemental Complaint for declaratory relief against the Court of Appeals and Mario Cuomo. You indicated that you have a complaint letter from Judge Joseph Bellacosa in your file. His administrative shenanigans regarding the Housing Court are set forth in full in the Supplemental Complaint. Together with my letter to Mario Cuomo, which you stated that you had read, my position is perfectly clear.

Also enclosed is my Petition for a Writ of Certiorari to the Supreme Court. Your attention is directed to the fifth question presented for review; your queries form part of the basis for that question. See the Statement of the Case, pages 1-5.

Appendix K

My position is clearly set forth in my advertisement in the Washington Legal Times, pages A-46-63.

As for the prior decision in *Babigian v. The Association of the Bar*, 744 F. Supp. 47 (S.D.N.Y. 1990), the amended complaint makes it perfectly clear why the decision is a fraud. That same issue is set forth in the Petition at page 6, question III, wherein the points of my brief to the Second Circuit Court of Appeals are set forth at A-86-98.

I'm also enclosing a copy of Professor Anthony D'Amatols article "Self-Regulation of Judicial Misconduct Could Be Mis-Regulation," 89 Mich. L. Rev. 609 (1989). Citing chapter and verse, it explains why judges often lie.

Yours,

John Babigian

APPENDIX L — CHIEF ATTORNEY'S INQUIRY OF THE STATE OF NEW YORK SUPREME COURT, THIRD JUDICIAL DEPARTMENT, DATED FEBRUARY 4, 1997

STATE OF NEW YORK APPELLATE DIVISION

SUPREME COURT THIRD JUDICIAL DEPARTMENT

In The Matter of **JOHN H. BABIGIAN,** An Attorney and Counselor-at-Law.

Committee on Professional Standards,

PETITIONER,

AND

JOHN H. BABIGIAN,

RESPONDENT.

CHIEF ATTORNEY'S INQUIRY

1. This Chief Attorney's Inquiry is made pursuant to Section 806.4(a) of the Rules of the Appellate Division of the Supreme Court, Third Judicial Department, governing the conduct of attorneys.

2. This inquiry is based upon information contained in files and records maintained by petitioner.

3. Respondent was admitted to practice as an attorney and counselor at law in the State of New York in 1953.

4. Upon information and belief, respondent in pursuing litigation, hereinafter described, violated Disciplinary Rules

Appendix L

1-102(A)(4)(5)(8) and 7-102(A)(1)(2)(5) of the Code of Professional Responsibility.

5. Respondent instituted litigation in the United States District Court for the District of Columbia against the Chief Justice of the United States and over sixty other parties. The amended and supplemental. complaints in said action were dismissed with prejudice by District Judge Sporkin in a Decision and order dated September 6, 1995. Judge Sporkin made the following findings:

a). Respondent commenced a frivolous lawsuit.

b). Respondent was attempting to retry claims that had been unsuccessfully litigated in other courts. He sought relief based upon claims that were over twenty years old and had been raised in at least seven jurisdictions.

c). The amended complaint was a near "carbon copy" of a complaint previously filed in the Southern District of New York. On appeal from dismissal of that action, the United States Court of Appeals for the Second Circuit observed that respondent is an attorney and has been fully put on notice of the intricacies of Rule 60(b). Any further prosecution of respondent's claims would be both frivolous and futile and would waste the time and resources of the court and opposing parties. Accordingly, any further attempts to prosecute the underlying claims or related claims may result in an order to pay double costs, attorneys' fees and other sanctions.

d). Respondent's supplemental complaint in the United

States District for the District of Columbia asserted that the defendants had denied him his civil rights causing injury to his reputation as an attorney and rendering "false and corrupt decisions".

e). Judge Sporkin determined that U.S. District Court for the District of Columbia lacked personal jurisdiction over the vast majority of defendants.

f). He further found venue did not lie in the District of Columbia for respondent's lawsuit.

g). He held that the Federal judicial defendants and the defendant Department of Justice attorneys were entitled to absolute immunity.

h). Judge Sporkin concluded that respondent's claims against the remaining defendants over which the court had jurisdiction were barred by the doctrines of res judicata and collateral estoppel.

i). In his conclusion, Judge Sporkin wrote "The Plaintiff has filed a frivolous lawsuit. This action is all the more egregious because he is an attorney and should be aware that he has brought a meritless suit that he is estopped from bringing, against defendants most of whom are protected by absolute immunity, or over whom this Court lacks jurisdiction. The Chief Justice of the United States should not be vexed with spending time and energy litigating a matter that plaintiff has lost many times over. The Amended Complaint and Supplemental Complaint will therefore be Dismissed, with prejudice. There must be an end to this baseless litigation."

Appendix L

6. Judge Sporkin directed respondent to show cause why monetary sanction should not be imposed and why he should not be enjoined from bringing any further claims or lawsuits related to the underlying action without the prior express permission of the court.

7. At a hearing conducted October 3, 1995, respondent denied his action was frivolous and refused to provide the court with assurances that he would end the litigation. He indicated that in all likelihood he would seek to continue to litigate the same claims. The court found respondent was unrepentant and unremorseful and gave every indication that he would continue to file frivolous, resource-wasting lawsuits. The judge referred to respondent's litigation as a "campaign of meritless serial litigation".

8. Monetary sanctions totalling $20,000 were imposed against respondent on behalf of two defendants. Additionally, respondent was enjoined from bringing any further new claims or lawsuits relating to the underlying action without the prior express permission of the court.

9. The United States Court of Appeals, District of Columbia Circuit, granted summary affirmance of Judge Sporkin's October 13, 1995 order. By Order filed December 3, 1996, respondent's petition for a rehearing was denied.

10. The aforesaid conduct merits further investigation to determine if disciplinary action by the Committee on Professional Standards is warranted against respondent.

11. This inquiry shall be deemed a part of the Committee's record and shall serve as the basis for further investigation to be conducted by the staff.

Appendix L

Dated: February 4, 1997

Mark S. Ochs, Chief Attorney

APPENDIX M — ADVERTISEMENT IN THE LEGAL TIMES WEEK OF JUNE 17, 1996

(ADVERTISEMENT)

LEGAL TIMES WEEK OF JUNE 17, 1996

REHNQUIST CIRCLES THE WAGONS

JUDICIAL CANDOR: CHIEF JUDGE

HARRY EDWARDS

VS.

PROFESSOR ANTHONY D'AMATO

BABIGIAN V. REHNQUIST, ET AL.

901 F. Supp. 17

(D.D.C. 1995)

Prior to the above-captioned memorandum opinion, a judicial. complaint was filed against Judge Stanley Sporkin for a preliminary memorandum opinion on the basis that the "opinion is not merely wrong; it warrants severe discipline because he (Sporkin) has engaged in willful blindness to all the critical facts and the applicable laws to the level of perjury and fraud."

In rejecting the complaint, Chief Judge Harry Edwards stated that "Stripped of its hyperbole, the essence of this complaint is that the subject judge has made judicial rulings with which complainant disagrees."

Appendix M

In November, 1995, an appeal was filed. The docketing statement lists the following issues:

> (1) Pursuant to 28 USC 331, does Chief Justice William H. Rehnquist and the Chief Judges comprising The Judicial Conference of the United States have a duty to investigate judicial misconduct when presented with "reliable evidence', indicating the likelihood of such misconduct, under the standard imposed by their own Code of Conduct for United States Judges, Canon 3(B)3?
>
> (2) Does Chief Justice William H. Rehnquist enjoy absolute immunity in his administrative function as head of The Judicial Conference of the United States?
>
> (3) Do the Federal Circuit Courts of Appeal have the authority to prevent the publication and the citation of summary orders?
>
> (4) Do the heads of the Criminal Division and the Public Integrity sections of the United States Attorney General's office have a good faith duty to investigate charges of judicial misconduct?
>
> (5) Do Federal officials enjoy absolute immunity when acting in their investigative capacity?
>
> (8) Did the court's characterization of the factual. allegations in the amended complaint and the supplemental. complaint constitute a manifest abuse of discretion?

(9) Did the court's own legal research on "the most basic principles of jurisdiction, immunity and col-lateral estoppel" constitute a manifest abuse of discretion?

(10) Does the court's conduct on the record warrant refusal under both 28 USC 144 and 28 USC 455?

Before the docketing statement was filed, Chief Justice William Rehnquist and the Federal officials moved for summary affirmance; in opposition, I stated that their memorandum of law was a fraud on the Circuit Court. No affidavits were ever presented to Sporkin or the Circuit, Court.

In *Babiaian v. Rehnquist,* Sporkin sanctioned me $20,000.00 for suing Justice Rehnquist, and the Chief Judges comprising the Judicial Conference of the United States, in their administrative capacity pursuant to 28 U.S.C. 333, the elastic clause of 28 U.S.C. 372(c), regarding judicial discipline. Specifically, the complaint accuses them of failure to investigate, and to report to the House of Representatives judicial misconduct that "might" involve impeachment.

"The Act does not merely authorize the Judicial Conference to certify to the House of Representatives that it inquire into the impeachment of a judge. By using mandatory language, the Act arguably *requires* the Judicial Conference to do so. See 28 U.S.C. #372(c)(7)(B), (8).11 *Matter of Certain Cpmplaints under Investigation,* 783 F.2d 1488, 1512 (11th Cir. 1986).

The complemental basis for the action is the Code of Conduct for United States Judges, Canon 3(B)(3): "A judge

should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." The justices of the U.S. Supreme Court have stated that they are bound by the Code. Tony Mauro, "Judging the Justices: An EthicsFree Zone?," LEGAL TIMES, May 24, 1993; Victor Williams, THIRD BRANCH INDEPENDENCE, "Who Judges the Supreme Court Justices," 5 Seton Hall Const. L. Jr. 851, 903-904 (1995).

It was the intent of Congress that the Code could be considered in determining whether the behavior of a judge is consistent with that specified in 28 U.S.C. 372(c). U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 96th Congress, Second Session, 1980, "Judicial Council Reform," p. 4323; Matter of Certain Complaints Under Investigation, 783 F.2d 1488, 151-3 (11th Cir. 1986).

In a preliminary memorandum opinion — *which he refused to allow the West Publishing Company to publish* — Sporkin denounced the entire complaint, composed of ten causes of action and a supplemental complaint, as totally frivolous. Ironically, one of the five Federal actions attacks the legality of summary orders which are stamped, "No publication/no cite." "Lamenting a Lost Precedent," LEGAL TIMES, November 6, 1995.

Regarding such summary orders and opinions, the Complaint quotes the following statement by Professor Monroe Freedman:

> "What I propose is that we have a Rule 11, a rule against frivolous and vexatious filings, for judges.

Appendix M

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules. These rules, I submit to you, are contrary to what Professor Fuller has called the inner morality of law of judicial opinion writing, the requirement that our public officials and particularly our judges articulate the bases of their opinions and publish them for accountability." JUDICIAL CONFERENCE - FEDERAL CIRCUIT (128 F.D.R. 409, 438, 1989).

Professor Freedman then proceeded to cite chapter and verse. 128 F.R.D. 440-441. When he sat down, a Federal judge whispered in his ear: "You don't know the half of it." Anthony D'Amato, "Self-Regulation of Judicial Misconduct Could be Mis-Regulation," 89 Mich. L. Rev. 609, 620 (1990). See also Professor Freedman's "When Judges Tamper With the Evidence," LEGAL TIMES, Nov. 19, 1990.

Professor D'Amato's article is a reply to Chief Judge Harry Edwards' thesis, set forth in "Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges," 87 Mich. L. Rev. 765 (1989), that the judiciary should be the exclusive arbiter of judicial misconduct. Professor D'Amato argues that laypersons should dominate ethics and misconduct boards, otherwise the standard operating procedure is a cover-up. His article is replete with examples of judicial misconduct, and

Appendix M

letters from attorneys regarding their experiences with dishonest judges. 89 Mich. L. Rev. 621-622.

Professor D'Amato's conclusion:

> "Do all judges more or less share in occasional misstating or omission of facts? I believe that the majority of judges are honest persons of great integrity who would not consciously do such a thing. Nevertheless, many judges may feel that their own standing in the community could be undermined by disclosures that other judges invent or misstate facts. The issue here is not which judges have integrity, but rather that the judicial culture itself apparently has little room for countenancing disclosure of misbehavior that could undermine public confidence in the judiciary. I would be far more disposed toward accepting Judge Edwards' plea for judicial selfregulation if I were to see concrete evidence of judges themselves bringing up the matter of candor in opinion-writing and offering practical suggestions as to how self-regulation can curb and eventually eliminate judicial invention or misstatement of facts." 89 Mich. L. Rev. 623.

Judge Edwards' position:

> "Judicial self-regulation is an effective tool to deal with misconduct because peer pressure can be a powerful. force within the ranks of the judiciary. It should not be underestimated. A judge who has been derelict in her or his performance usually knows it and does not look forward to serious admonition

> from colleagues. Admonition may call into question one's fairness, honesty, intelligence, judgment, wisdom, or commitment — the precise characteristics that mark a distinguished career on the bench. It is the height of humiliation to be graded poorly in these areas, or to be accused by one's own peers of demeaning the dignity of the office, especially pursuant to a charge of misconduct. *The threat of peer condemnation tempers even the most arrogant judge*, so we can be sure that individual independence does not insulate a judge from effective peer regulation." 87 Mich. L. Rev. 795 (emphasis supplied)

In "The Judicial Function And The Elusive Goal of Principled Decisionmaking," 1991 Wis. L. Rev. 837, Judge Edwards hedged his position, at least regarding appellate decisionmaking on the D.C. Circuit, by conceding that "it is no longer clear to me that partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking." 1991 Wis. L. Rev. 849.

He then stated:

> "This vision of a politicized judiciary, in which cases are decided on ideological grounds and judges defined by their partisan affiliations, seems to grow more popular each year. By now, it is almost taken for granted by much of the media, and doubtlessly accepted as truth by significant portions of the bar and the public as well. This is a depressing reality, for, in my view, it is the worst indictment for judges to be labeled political partisans and to be seen as

> resultoriented in their decision-making. These are frightening accusations, for they suggest that there can be no 'justice' in our judicial system." 1991 Wis. L. Rev. 849-850.

It is submitted that Judge Edwards' theory of peer pressure is a pipe dream, and that judges will resort to perjury and extortion to protect other judges and prominent public officials and lawyers.

The problem has been recognized by Senator Charles Grassley, who chairs the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. His questionnaire to Federal judges includes the following:

> 7a. How many opinions are not certified for publication per year?
>
> b. What standards or criteria are used to determine when opinions are to be published?
>
> c. Does your court withdraw published opinions, and if so, under what circumstances?
>
> d. Does your court have a procedure for certifying opinions for publication on a motion of a party?
>
> e. If so, how do the standards for publication pursuant to a motion differ from the standards for publication not at the request of a party?
>
> f. Under what circumstances do you permit litigants to cite unpublished opinions?

Appendix M

g. What weight do you give to unpublished opinions?

h. Some have suggested that court policies regarding the publication of opinions and withdrawal of published opinions foster a number of problems, including an unfairness to litigants, a loss of judicial accountability, and an uncertainty about precedential status and actual. judicial economy. (See, e.g., *Dragich, Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U.L. Rev. 757 (1995).) What isyour view on these suggestions?

In both the unpublished opinion and the reported decision, Sporkin sets forth the following basis for imposing sanctions under his inherent authority: "In filing the complaint, the Plaintiff ignored the most basic principles of jurisdiction, immunity and collateral estoppel." Between 1966 and 1976, I conducted a legal research service.

Let the games begin.

At 901 F. Supp. 18, Sporkin sets forth the extent of his legal research prowess on the issue of frivolous lawsuits: "A court may find an argument frivolous if a competent attorney would view the argument as unreasonable. *Cousin v. District of Columbia*, 142 F.R.D. 574, 577 (D.D.C. 1992)." He imposed the sanctions under his inherent power. Take a gander at the following decision, decided almost 2 months before, on the stringent standards required under a court's inherent power:

Appendix M

Shepherd v. American Broadcasting Co, Inc., 62 F.3d 1469 (D.C. Cir. 1995).

In his unpublished opinion, which concludes with an order to show cause as to why I should not be sanctioned, Sporkin opined: "in this case, the Chief Justice of the United States and the Chief Judges comprising the Judicial Conference of the United States are entitled to absolute immunity from the Plaintiff's lawsuit by virtue of their status as judges. The Defendant Department of Justice attorneys who elected not to initiate an investigation into the Plaintiff's allegations are also protected by absolute immunity *because they were carrying out their duties as government officials*." (emphasis supplied)

In his memorandum of law to dismiss the Complaint pursuant to Rule 12(b)(6), Justice Rehnquist took the same position despite my citation of *Forrester v. White*, 484 U.S. 219 (1988), which clearly holds that judges do not enjoy absolute judicial immunity for acting in their administrative capacity. Indeed, in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86 (1970) and *Hastings v. Judicial Conference of United States*, 770 F.2d 1093, 1.102 (D.D.C.), cert. den. 477 U.S. 904 (1985), the courts held that proceedings under 28 U.S.C. 372 (c) are essentially administrative in nature. See also *In Re Complaints of Judicial Misconduct*, 9 F.3d 1562 (U.S. Jud. Conf. 3-993).

In his memorandum of law, Judge Rehnquist simply ignored the issue of judges' administrative functions, and only cited cases that involve rulings by judges in their judicial capacity. I pointed out that in the dissenting opinion in *Pulliam v. Allen*, 466 U.S. 522, 544 (1984), he acknowledged that judges can be held liable for attorneys fees for rendering erroneous

judicial decisions. See also *K.G. Jan Pillai, Judicial Immunity,* 39 HW.L.J. 95, 98-99 (1995).

I am not suing the Chief Judges for damages, only declaratory relief is requested. In his memorandum of law, Justice Rehnquist makes the same false statement.

The judicial misconduct that "might" involve impeachment refers to decisions rendered by six New York Federal judges in a *single* action. They are also being sued strictly for declaratory relief; Sporkin doesn't even mention this critical cause of action. Justice Rehnquist acknowledges this action against the New York Federal judges, but he also falsely states that I am suing them for damages.

Sporkin doesn't cite a single decision in support of his; wacky and preposterous statement that Government officials always enjoy absolute immunity. Indeed, in *Richardson v. U.S. Department of Interior,* 740 F. Supp. 15, 22 (D.D.C. 1.990), and in *Gaubert v. Gray,* 747 F. Supp. 40, 45 (D.D.C. 1.990), he makes the following statement: "in general, there are two types of immunity that shield the actions of federal government officials — absolute and qualified." In both decisions, and in almost identical languages, he then proceeded to discuss the differences.

Needless to say, Sporkin has written other decisions recognizing qualified immunity for government officials. indeed, in a decision which is closely related to the action to expunge my false disciplinary punishment of a letter of admonition, and an abusive investigation conducted in total bad faith, he clearly recognized qualified immunity. *Siegert v. Gilley,* 692 F. Supp. 1406, 1411-1412 (D.D.C. 1988).

Appendix M

In the unpublished opinion, Sporkin sets me up with a disingenuous memorandum of law captioned as follows:

> "II. THIS COURT LACKS PERSONAL JURISDICTION OVER THE VAST MAJORITY OF THE DEFENDANTS NAMED IN THIS LAWSUIT BECAUSE THEY DO NOT RESIDE OR MAINTAIN THEIR PRIMARY PLACE OF BUSINESS IN THE DISTRICT OF COLUMBIA AND ARE NOT SUBJECT TO THE DISTRICT OF COLUMBIA'S LONG ARM STATUTE.
>
> "III. VENUE DOES NOT LIE IN THE DISTRICT OF COLUMBIA FOR THIS LAWSUIT."

His memorandum never mentions the main basis for jurisdiction in Washington - ancillary and pendent jurisdiction. As Sporkin stated in *Gaubert v. Gray,* 747 F. Supp. 40, 50 (D.D.C. 1990):

> "[I]f a plaintiff's pleadings disclose a substantial federal claim, a federal court has the power to hear pendent state claims that 'derive from a common nucleus of operative fact' and if they are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding.' *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (3-966). The exercise of jurisdiction over such related state law claims is known as pendent jurisdiction. See 13B Wright & Miller & Cooper, Federal Practice & Procedure 13567.1 (1984)."

Appendix M

Sporkin's shenanigans on pendent jurisdiction were captured in *Edmonson & Gallagher v. Albany Towers Tenants Ass'n,* 48 F.3rd 1260, 1265-1266 (D.C. Cir. 1995);

> "Because the cause had raised a legitimate federal question and the common law claims formed 'part of the same case or controversy,' 28 U.S.C. '1367(a) (SUpp. 1993), the district court clearly had the power to decide the common law claims. Whether actually to decide them is a matter left to the sound discretion of the district court, guided by consideration of the factors enumerated in 28 U.S.C. '1367(c), which essentially codifies the leading decision on pendent (now "supplemental") jurisdiction.

Here, *if the district court considered the relevant factors at all,_it left no written trace of the process; after dismissing the RICO claims the court plunged into the common law ones with no apparent pause for breath.* See 829 F. Supp. at 425.11 (citations omitted, emphasis supplied)

The above peer condemnation did not temper Sporkin in the least — he did it again. *Gary v. Long,* 59 F.3d 1391, 1400 (D.C. Cir. 1995).

Sporkin is also willfully blind to the issue of pendent venue. He cites *Reuber v. United States*, 750 F.2d 1039, 1049 (D.C. Cir. 1984) for the proposition that the "only means for obtaining personal jurisdiction over these defendants . . . is via the District of Columbia Long-Arm statute." He then ostentatiously sets forth the text of the D. C. Code.

Appendix M

At the preceding page 1048 of *Reuber,* the court spends a full page discussing pendent venue. Headnote number 2 summarizes that page as follows:

> Pendent venue, unlike pendent jurisdiction, aims to promote judicial economy as well as convenience and fairness to the parties and, in deciding whether to invoke pendent venue, district court must consider same factors that bear on economy and convenience as in deciding whether to exercise pendent jurisdiction, i.e., whether pendent and principal claims arise out of common nucleus of operative facts, and whether they involve the same witnesses. 28 U.S.C.A. 1346(b), 1402(b).

In *Siegert v. Giller,* 692 F. Supp. 1409, Sporkin points out that on a Rule 12(b)(6) motion "the truth of the allegations in the complaint and plaintiff's supporting materials must be taken as true, and any ambiguities or uncertainties concerning the sufficiency of the claim must be resolved in favor of the plaintiff . . . The defendant . . . has not put into evidence any affidavits which contradict the substantive facts set forth by plaintiff. I must therefore treat the facts alleged by plaintiff as admitted, as I would on a motion to dismiss. As the Supreme Court has asserted, a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . ." (citations omitted)

The complaint contains 276 allegations, and is interspersed with 76 pages of documentation in support of the critical allegations. The complaint also contains 75 pages of exhibits, including two complaint letters to Justice Rehnquist, and

subsequent correspondence with him and his special adviser at the Supreme Court, Cynthia Rapp. It also contains a 1973 secret ethics opinion, secret correspondence, and the secret Internal Hearing Memorandum stolen from my sealed disciplinary file ten years afterwards. it also contains documents destroyed by the Grievance Committee; I persuaded the N.Y. County Lawyers Association to disgorge them after viewing the above documents. They also destroyed my 1965 ethics opinion, which they never disclosed to the 1973 Ethics Committee or to the Grievance Committee which investigated me in 1974-75.

In the first memorandum opinion — 17 typed pages Sporkin doesn't refer to a single factual allegation in the complaint, and totally ignores every documented allegation against the defendants. indeed, he doesn't mention Rule 12(b)(6) in either opinion.

Here is how Sporkin summarized the first 53 pages of the complaint regarding the disciplinary proceedings:

> "The Bars of Florida and Hawaii, as well as individual attorneys, subsequently filed complaints against the Plaintiff with the New York City Bar. They accused the Plaintiff of, among other things, advertising legal services to laymen and engaging in the unauthorized practice of law, in violation of the Canons of Professional Ethics. The New York City Bar conducted an investigation of the Plaintiff and, on November 7, 1973, issued an 'Admonitory Letter.' "

The 1973 Admonitory Letter was issued before the 1974 investigation. At the Grievance Counsels' suggestion, I

requested the 1965 Ethics opinion on the Hawaii complaint; in pertinent part the opinion stated it was o.k. to solicit out-of-state and foreign nation attorneys, and to mention my fee schedule. The 1973 Admonitory Letter — issued by the same 3-965 Grievance Counsel — states in pertinent part that the quotation of fees violated the ethical rule regarding "dignified announcements," and that since out-of-state and foreign nation attorneys were not admitted to practice in New York, they were not attorneys.

The 1974 Florida complaint was never placed in the record of the investigation; it was revealed after the investigation, and a secret letter, discovered in my disciplinary file, clearly indicated a conspiracy to destroy my legal research service.

In Exhibit "C" of this complaint is the first complaint letter, dated 11/17/92, in which I set forth to Judge Rehnquist all the critical facts which were ignored completely by Judge John M. Cannella in *Babigian v. The Association of the Bar, et. al,* 744 F. Supp. 47 (S.D.N.Y. 1990).

The above decision was written 6 days after I filed a complaint stating that Cannella was mandated to deny the 4 motions to dismiss under Rule 12(b)(6), and to impose severe sanctions against the defendants. I then told Cannella that to dismiss my complaint would require him to lie through his teeth. Cannella was one of the "Seven Blocks of Granite" at Fordham in the early thirties.

In this complaint I allege that Cannella's decision "on its face is so sketchy, so sleazy and so screwy that it looks like a snap final exam in Federal Practice & Procedure, and should be utilized as a testing tool for new Circuit Court judges." I

then backed it up with 19 evidentiary allegations. The same applies to Sporkin's two opinions.

At 744 F. Supp. 52, here's how Cannella dismissed the Supplemental Complaint:

> "Plaintiff has filed a Supplemental Complaint which adds a cause of action for damages against the State defendants. The Supplemental Complaint, *which contains no specific factual allegations,* reads in pertinent part as follows: 'Defendants Gentile, Reynolds and Murphy conspired to block an investigation of plaintiff's complaints against the Grievance Committee defendants, and willfully refuse to grant plaintiff further access to his investigatory file in order to deny plaintiff the evidence required to sustain this action.' Supplemental Complain, & 158.
>
> "State defendants move on various alternate grounds to dismiss the Supplemental Complaint. Plaintiff opposes the motion. After carefully reviewing and considering the arguments submitted by the parties, the Court finds that the Supplemental Complaint clearly fails to state a claim against any of the State defendants. Accordingly, for the reasons stated in the Memorandum of Law in Support of the State Defendants' Motion to Dismiss the Supplemental Complaint, the Supplemental complaint is dismissed. Leave to replead is denied." (emphasis supplied)

Paragraph 153 of the Supplemental Complaint adopted by reference the preceding 152 paragraphs of the complaint.

Appendix M

A notice for depositions of the 3 defendants mentioned above was filed simultaneously with the Supplemental Complaint.

Cannella issued a protective order on March 21, 1989, against the depositions, falsely stating that it was based on a hearing.

At 744 F. Supp. 52, Cannella states, in footnote 4: "Plaintiff did not obtain the Court's permission before serving the Supplemental Complaint in violation of Rule 15(d)."

Five days after the fabricated March 21, 1989, protective order, counsel and I made an agreement to allow a motion to dismiss the Supplemental Complaint on the merits based on personal affidavits by the three defendants; it was too late to make a notion based on Rule 15(d). Two written extensions of time were filed with the Court. On June 24, 1989, counsel moved to dismiss on the grounds that Rule 15(d) was violated, and submitted no affidavits, just a memorandum of law.

At 744 F. Supp. 50, Cannella correctly states three of the! cardinal principles governing Rule 12(b)(6) motions: (1) the Court must assume the allegations in the complaint are true, (2) a complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," and (3) a court's function "is not to weight the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient."

Cannella ignored two other cardinal principles cited in my brief. in considering a Rule 12(b)(6) motion to dismiss, the

court must limit itself to the allegations stated in the complaint, including documents incorporated by reference, plus matters of which judicial notice may be taken. *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). The movants' legal arguments and interpretations, and their factual. contentions in briefs of memoranda, are not evidence, and cannot be considered by the court. *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988); Sardo v. McGrath, 196 F.2d 20, 23 (D.C. Cir. 1952).

At, 744 F. Supp. 51, footnote 2, the Court adopted as gospel 3 more pages of movants' memoranda; at 744 F. Supp. 52, footnote 3, ditto 32 more pages. In the same footnote the Court indecently exposed its bias by stating that all the defendants moving papers are "detailed and well documented."

In *DiLeo v. Ernst & Young*, 901 F.2d 624, 636 (7th Cir. 1990) the above practice was pegged for what it is:

> "The judge accepted the 'reasons set forth in E & W's briefs' in the district court. Even if we had copies of these briefs (no one supplied them to us), they would be inadequate. A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. E.g., *Walton.v. United*

Consumers Club, Inc., 786 F.2d 303, 313-14 (7th Cir. 1986); *In re X-Cel Inc.*, 776 F.2d 130 (7th Cir. 1985). Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more."

The complaint before Cannella contained 8 causes of action. Strictly based on the statute of limitations, he dismissed the 2 civil rights actions for damages against The Association of the Bar defendants and The Florida Bar defendants; the other six actions were for declaratory relief.

Cannella doesn't indicate in his decision the basis for his bald conclusion that I didn't exercise due diligence to gain access to my disciplinary file, neglecting to tell the reader that. under N.Y. Judiciary Law 90(10) the file is sealed, and that I was attacking the constitutionality of that law. He doesn't mention the two attempts I made to gain access, and the denials based on the above statute.

Cannella doesn't tell the reader that I gained access to my disciplinary file by a ruse and a fluke. I told the 1986 chief counsel of the Grievance Committee that I had to look at the file quickly to fill out my application to be a judge. To that chief counsel, Michael Gentile, the defendant in the Supplemental Complaint, the file smelled like a rose, so he never checked me out with the 1975 chief counsel. All the above was clearly alleged in the complaint.

Obviously, the present complaint includes the pendent claims which were ignored by Cannella: (1) expunge my false

disciplinary record and file, (2) the attack on N.Y. Judiciary Law 90(10), (3) the attack on secret ethics opinions, and (4) the attack on informal disciplinary punishment without notice and a hearing.

Sporkin doesn't even mention the above actions but, in the unpublished opinion, has the effrontery to declare: "What plaintiff hopes to accomplish by endlessly prosecuting the same baseless claims is difficult to discern." At the order to show cause hearing on October 3, 1995, I asked Sporkin twice to specify for the record which of the 11 causes of action were frivolous. The first time he changed the subject.; the second time he stated "I have stated what I've said in my opinion, and I am not answering questions to you."

Sporkin then let it all hang out:

> "Now, let me point out something to you, that what does concern me, as expressed by the Assistant United States Attorney, that actions such as this are taking a lot of our time and energy. They are frivolous. They've got to be stopped. It doesn't do you well as a member of the bar to keep filing actions like this. They — any way you want to say it or twist it, you just don't go out and sue the Chief Justice of the United States.
>
> "MR. BABIGIAN: Are you saying he's above the law, sir?
>
> "THE COURT: Listen to me. Listen to me now. You just don't go and sue the Chief Justice of the United States for doing even alleging what you said he did,

which was not to take action. if you did, we would be tying this gentleman up who has very important duties and responsibilities, as do the other judges here, with having to defend themselves in every court in the land every time they turn around and look the other way. That cannot be the system. You know it's not the system, and I know it. You know better, that this is wrong what you did here. You know that.

"MR. BABIGIAN: Sir —

"THE COURT: You know what I'm telling you here, and you just don't go about doing what you did here. We cannot spend the energy, or the time, or the effort to have to deal with these kinds of frivolous lawsuits."

Judge Edwards did not see the transcript when he characterized by complaint against Sporkin as hyperbole. The complaint papers, including the transcript, were then considered by the following Circuit Court judges: Wald, Buckley, Ginsburg, Randolph, Rogers, and Tatel, plus District. Court judges: Penn, Johnson, Jackson, Lamberth and Kessler.

I suggested to the Judicial Council that it would be poetic justice to order the West Publishing Company to publish Sporkin's opinions as one decision, with the transcript — 20 pages of double-spaced typing — as an addendum. Without a hearing, my petition for review was denied.

What would you think about the D.C. Circuit Court if they affirm Sporkin's opinions?

Appendix M

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